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IN THE

SUPREME COURT OF THE UNITED STATES

(OCTOBER 1980 TERM)

LEONARD DURAN ENRIQUEZ,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

TO THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SKARECKY & HORENSTEIN
A Professional Association
By DENNIS SKARECKY
3130 N. Third Avenue, #300
Phoenix, AZ 85013
(602) 248-0393
Attorney for Petitioner
LEONARD DURAN ENRIQUEZ

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Petitioner, LEONARD DURAN ENRIQUEZ, requests that a Writ of Certiorari issue to review the judgment and decision of the United States Court of Appeals for the Ninth Circuit, San Francisco, California, No. 79-1714, entered March 24, 1981, affirming the Petitioner's conviction and sentence in the United States District Court for the District of Arizona, Phoenix, Arizona.

OPINIONS BELOW

A copy of the decision of the United States Court of Appeals for the Ninth Circuit, No. 79-1714, March 24, 1981, affirming the Petitioner's conviction is attached in the Appendix to this Petition For Writ of Certiorari.

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Ninth Circuit Court of Appeals in this question of first impression before a United States Court of Appeals, by upholding the conviction of Petitioner, LEONARD ENRIQUEZ, of violation of 21 U.S.C. §848, for engaging in a continuing criminal enterprise, misconstrued and misinterpreted the requisite elements of the offense including the requirements that there be a "continuing series of violations of this subchapter" undertaken together with "five or more other persons" and from which series of violations "substantial income or resources" is derived when the substantive violations of which Petitioner was convicted consisted solely of eleven uses of a telecommunication facility (telephone calls)?

2. Whether the Ninth Circuit Court of Appeals rendered a decision in conflict both with the decisions of the other Courts of Appeal and the applicable decisions of this Court in violation of Petitioner LEONARD ENRIQUEZ'S right to be free from unreasonable searches and seizures constitutionally guaranteed by the Fourth Amendment to the Constitution of the United States when said Court:

A) Upheld the propriety of admission into evidence of the contents of telephone conversations obtained pursuant to electronic surveillance, the authorization for which came from a federal judge who was presented with sworn Affidavits by officials of the Drug Enforcement Administration which specifically withheld from the judge the totality of the ordinary procedures used against the Petitioner including a transaction in which the federal agents successfully involved Petitioner in a

cocaine transaction and also withheld from the judge that a surveillance apartment had been successfully established for observation of the residence of Petitioner and where the remainder of the Affidavits consisted of statements, unsupported by adequate facts, that other methods had been tried, failed or were unlikely to succeed or were too dangerous and where the vast preponderance of said statements applied or related to individuals other than Petitioner?

B) Upheld the denial of a hearing under the doctrine of Franks v. Delaware where the Affidavits submitted in support of the Petition for wire tap authorization contained facts which were intentionally or recklessly false or omitted facts which made the statements contained recklessly or intentionally false, including omissions regarding both a successful cocaine transaction instituted by Government agents involving Petitioner and the successful establishment of a surveillance apartment on Petitioner's residence and when the remainder of the Affidavits, after the removal of the false material, failed to establish that ordinary procedures would be inadequate?

C) Upheld the admission into evidence of the contents of telephone conversations obtained through electronic surveillance where prior to the authorization of the wire taps by the federal judge, the Drug Enforcement Administration obtained, through use of its own administrative subpoena, cable and pair information from the telephone company and was on the site of said cable installation, all in violation of 18 U.S.C. §2510 et seq.,

which prohibit admission into evidence of information obtained pursuant to electronic surveillance where even the "endeavor" was made prior to the court authorization of the surveillance?

D) Upheld the use at trial of telephone conversations obtained pursuant to electronic surveillance, the conversations having been presented on composite tapes, not made from the original tapes with none of the tapes or copies thereof having been sealed under the direction of the judge and where there were discrepancies between the original tapes and the composite tapes used at trial, all in violation of 18 U.S.C. §2510 et seq.?

LIST OF ALL PARTIES

Leonard Duran Enriqeuz

Barry J. Hoffman

Alfred O. Enriquez

Adrian Lopez

Hal Marion Glotfelter

John Herman Johnson

Virginia Ramirez

United States of America

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OFFICIAL AND UNOFFICIAL REPORTS

The Ninth Circuit issued a Memorandum Decision on March 24, 1981 in Cause No. 79-1714.

JURISDICTION

On March 24, 1981, the United States Court of Appeals for the Ninth Circuit, in Cause No. 79-1714, affirmed the conviction and sentence of the Petitioner in the United States District Court for the District of Arizona, Phoenix, Arizona.

Petitions for Rehearing of Co-Defendants were denied May 4, 1981. No extensions of time for filing the Petitions were requested or granted.

Your Petitioner submits that Title 28 U.S.C. §1254(1), and Rule 17(1) of the Supreme Court Rules confers jurisdiction on this Court. Special and important reasons for granting this Writ exist because the United States Court of Appeals for the Ninth Circuit has:

> (1) ". . . decided an important question of federal law which has not been, but should be, settled by this Court."
>
> (2) ". . . rendered a decision in conflict with the decision of another Court of Appeals on the same matter, . . ."
>
> (3) "decided a federal question in a way in conflict with the applicable decisions of this Court; . . ."
>
> (4) ". . . has so departed from the accepted and usual course of judicial proceedings, and so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision."

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

See Appendix where the constitutional provisions and statutes involved are set forth verbatim at pp. 85-93 of the Appendix.

STATEMENT OF THE CASE

Appellant LEONARD DURAN ENRIQUEZ was indicted with 21 others on August 9, 1978. (Clerk's Record 1, hereinafter CR) He was named in Counts 1, 3, 17, 18, 20, 26, 27, 28, 29, 30, 31, 32 and 34. In Count 1, he was charged with conspiracy with all Co-Defendants to knowingly and intentionally distribute and possess, with intent to distribute heroin and cocaine, Schedule I and II narcotic drug controlled substances, in violation of Title 21, United States Code, §§841(a)(1) and (b) and 846. In Count 3, LEONARD ENRIQUEZ was accused of knowingly and intentionally engaging in a continuing criminal enterprise in violation of Title 21, United States Code, §848. In Counts 17, 18, 20, 26, 27, 28, 29, 30, 31, 32 and 34, LEONARD ENRIQUEZ was accused of knowingly and intentionally using a communication facility (telephone) in facilitating the conspiracy in violation of Title 21, United States Code, §843(b). (CR 1)

Nine of the Defendants named in the indictment went to trial. All of the others, with the exception of one "John Doe" Defendant, plead guilty to various related offenses.

Nearly all of the evidence presented at trial by the Government was obtained either from the contents of wire taps or was itself the contents of wire taps. In regard to the §848 conviction of a continuing criminal enterprise, the series of violations which provided the alleged basis for the conviction were the eleven telephone calls made by LEONARD ENRIQUEZ. No more substantive nor concrete allegation for conviction existed in regard to Petitioner. The jury was charged in order to convict Petitioner LEONARD ENRIQUEZ of a §848 violation, that they must "find that LEONARD DURAN ENRIQUEZ committed three or more successive felony violations charged in the indictment." (RT 42:256)

In regard to the contents of the wire taps themselves, the disputed issues involve three areas: 1) adequacy of the Affidavits in support of the application for the wire taps, 2) use of composite tapes made from unsealed duplicate tapes, and 3) use of cable and pair information.

The Government witness testified that Mountain Bell provided cable and pair information to agents of the Drug Enforcement Administration. (RT 9:125-36) A cable was explained as the facility from a telephone switching office containing within itself anywhere from 200 to 1500 wires while a pair is the pair of wires which feeds a particular telephone and is unique to that phone. (RT 9:136) The witness explained that the information provided enables one to obtain access to the particular numbers served by the cable and pair. (RT 9:150-51) A Government agent obtained cable and pair information and was on location of the same approximately one month before a court order authorizing the wire tap was issued. (RT 11:136-37) A pen register was installed on February 9, 1978. (RT 11:142) The Drug Enforcement Administration was on the site numerous times (2-4) prior to the date of the pen register installation, using the valuable cable and pair information as a predicate to a wire tap. (RT 11:142-46) In addition there were visits to a second location after the cable and pair information was obtained on April 6 in regard to that location and before the court order authorizing electronic surveillance in regard to that telephone number. (RT 11:144) The cable and pair information related to the first wire taps were obtained on February 7, approximately two weeks before the court approval for the pen register interception and, on the other telephone, the cable and pair information was obtained on April 6, 1978 prior to the court order of May 2, 1978 and was turned over by the telephone company pursuant to administrative subpoena.

(RT 11:148-49) The subpoenas used for the obtaining of the information were Drug Enforcement Administration subpoenas issued prior to any court order authorizing the wire tap. (RT 12:10-14) The information received in response to these subpoenas was the cable and pair information. (RT 12:16-18) The Drug Enforcement Administration agent further testified that the only use to which cable and pair information could be put was the interception of telephone calls. (RT 14:181)

The issue involving the tapes used at trial arose from the fact that three sets of tapes were recorded by the Drug Enforcement Administration pursuant to the wire tap authorization: original tapes, duplicate original tapes, and work tapes. (RT 14:33-34) The composite tapes used at trial were made from the duplicate tapes, (RT 13:164) which had never been before the judge and sealed. (RT 30:189) Moreover, the original tapes themselves were not sealed by the judge or under his direction but were sealed by the Drug Enforcement Administration before these tapes were ever brought before the judge. (RT 13:159-62, 189) Discrepancies existed between the original tapes, the duplicates and the composites. (RT 24:93-95)

The Affidavits submitted in support of a requested order for authorization for electronic surveillance were conclusory and did not demonstrate a factual basis that adequate and ordinary investigative procedures were or would be successful. (See Affidavits.) Oral argument was heard on Petitioner's and Co-Defendants' Motions to Suppress. (RT 1, 1A, 3) All Motions to Suppress were denied. (CR 315) The District Court which authorized the wire t ps was unaware that at the time the Affidavits for the second and third wire taps were submitted to the court that a cocaine transaction had occurred at the instigation of the Drug Enforcement Administration before the second and third wire taps and application therefor wherein Petitioner LEONARD

ENRIQUEZ and another Defendant transferred cocaine for Drug Enforcement Administration supplied mannite. (RT 25:60-64) The Affidavits failed to inform the judge authorizing the same of this transaction. The Affidavits also failed to reveal that a surveillance apartment had been set up across the alley from the apartment of Petitioner LEONARD ENRIQUEZ. (RT 26:163-65, 176-78)

The jury trial lasted from June 5, 1979 until August 24, 1979. Petitioner was convicted of engaging in a continuing criminal enterprise in violation of 21 U.S.C. §848 (CR 1, CR 450), conspiracy in violation of 21 U.S.C. §846 and eleven counts of use of a communication facility in furtherance of the conspiracy in violation of 21 U.S.C. §843(b).

On October 1, 1979, LEONARD ENRIQUEZ was sentenced by District Court Judge CARL A. MUECKE, the trial judge. He was sentenced to "imprisonment for a period of THIRTY (30) YEARS and a fine of $25,000.00, on Count 3, followed by a lifetime special parole term; THREE (3) YEARS imprisonment on each of Counts 17, 18, 20, 26, 27, 28, 29, 30, 31, 32 and 34, said sentencing of imprisonment to run consecutively to each other and concurrent with Count 3, pursuant to Title 18, United States Code, §4205(b)(1) on all counts, with a minimum of ELEVEN (11) YEARS in custody." (CR 498) Yet subsection C of 21 U.S.C. §848 provides that probation may not be granted and that the above section of Title 18, as amended, shall not apply thus imposing a minimum sentence of thirty years for conviction of involvement in eleven telephone calls.

Jurisdiction existed for Petitioner's appeal to the Ninth Circuit by virtue of 28 U.S.C. §§1291 and 1294.

ARGUMENT I

WHETHER THE NINTH CIRCUIT COURT OF APPEALS IN THIS QUESTION OF FIRST IMPRESSION BEFORE A UNITED STATES COURT OF APPEALS, BY UPHOLDING THE CONVICTION OF PETITIONER, LEONARD ENRIQUEZ, OF VIOLATION OF 21 U.S.C. §848, FOR ENGAGING IN A CONTINUING CRIMINAL ENTERPRISE, MISCONSTRUED AND MISINTERPRETED THE REQUISITE ELEMENTS OF THE OFFENSE INCLUDING THE REQUIREMENT THAT THERE BE A "CONTINUING SERIES OF VIOLATIONS OF THIS SUBCHAPTER" UNDERTAKEN TOGETHER WITH "FIVE OR MORE OTHER PERSONS" AND FROM WHICH SERIES OF VIOLATIONS "SUBSTANTIAL INCOME OR RESOURCES" IS DERIVED WHEN THE SUBSTANTIVE VIOLATIONS OF WHICH PETITIONER WAS CONVICTED CONSISTED SOLELY OF ELEVEN USES OF A TELECOMMUNICATION FACILITY (TELEPHONE CALLS)?

The indictment in Count 3 alleges that LEONARD ENRIQUEZ engaged in a continuing criminal enterprise in violation of §848 of Title 21, United States Code, through his violations of United States Code, Title 21, §§841(a)(1) (Controlled Substance), 843(b) (Use of a Telecommunication Facility) and 846 (Conspiracy). In addition to conviction on the Continuing Criminal Enterprise Count, LEONARD ENRIQUEZ was convicted on counts in violation of §846, (Conspiracy) and §843(b) (Use of a Communication Facility to Facilitate a Conspiracy). For reasons which will hereinafter be set forth, it is the position of LEONARD ENRIQUEZ that his conviction of violation of §848 must be reversed since the continuing criminal enterprise statute, as enacted and as intended by Congress, did not cover or contemplate the violations of which he was convicted as satisfying the requirements of engaging in a continuing criminal enterprise and because §848 as applied involves invidious discrimination which deprives LEONARD ENRIQUEZ of rights guaranteed by the Constitution of the United States.

21 U.S.C. §848 provides as follows in relevant part:

> For purposes of subsection (a) of this section, a person is engaged in a continuing criminal enterprise if--(1) he violates any provision of this subchapter of subchapter II of this chapter the punishment for which is a felony, and (2) such violation is a part of a continuing series of violations of this subchapter or subchapter II of this chapter--(A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position or any other position of management, and (B) from which such person obtains substantial income or resources.

The gist of the crime is not the agreement among confederates in the enterprise to do business, but the willful orchestration of a series of felonies under the subchapter for substantial income. United States v. Fry, 413 F. Supp. 1264, 1272 (DC Mich. 1976). The intent of Congress in enacting this section was to punish severely the professional criminal. United States v. Jeffers, 432 U.S. 137 (1977) at footnote 26. §848 is aimed at "the business of trafficking in the prohibited drugs on a continuing, serious, widespread, supervisory and substantial basis." United States v. Sperling, 506 F.2d 1323, 1344 (2nd Cir. 1974), cert. denied 420 U.S. 962 (1975). There would also appear to be little dispute that the word "series" in §848 refers to three or more related acts. United States v. Collier, 358 F. Supp. 1351 (1973).

The Government prosecutor maintained and the lower courts found from a first and literal reading that §848 would seem to indicate a law which provides that three telephone calls (use of a communication facility) would be sufficient to convict an individual of a continuing criminal enterprise. But can this have been the Congressional intent? Would such a series of acts fulfill the purpose of §848 in penalizing the professional criminal who traffics in prohibited drugs on a continuing, serious, widespread, supervisory and substantial basis? Do three telephone calls justify a minimum sentence of ten years in prison together with fines and forfeitures (or in this case, a thirty year sentence not subject

to parole)? The Government so argued for, with respect to telephone calls being a predicate for conviction under 21 U.S.C. §848. Appellee on page 78 of its Brief, wrote: "For example, §843(b) would reach Enriquez's use of the phone to make a plane reservation to fly to a city where he planned to pick up cocaine if the trip was in furtherance of the conspiracy." Is it then the Government's contention that three telephone calls, all regarding plan reservations, would be sufficient for a continuing criminal enterprise conviction? Equity and common sense argue against such a conclusion. Further such a interpretation of §848 would seem to justify the fears expressed by some supporters of this legislation in Congress that attempts would be made to apply this legislation, necessarily worded generally, to situations far outside the Congressional intent. Congressional Record, United States House of Representatives, September 24, 1970, pp. 33627-33628; Legislative History, P.L. 91-513, Drug Control Act, pp. 4648-4653.

At the time of trial in 1979, neither the defense, the prosecutor nor the Court could point to a single case since the enactment of this legislation in 1970 where, solely based on counts of use of a communication facility to facilitate a violation, there was provided a basis for a conviction of a continuing criminal enterprise, §848.

In arguing the motion for LEONARD ENRIQUEZ for judgment of acquittal, defense counsel used an example where if LEONARD ENRIQUEZ called eleven other individuals and told each of them to bring one ounce of cocaine to a designated location and then LEONARD ENRIQUEZ himself brought five ounces to the designated location and the gathered one pound of cocaine would then be sold for $20,000.00, under the Government's theory, LEONARD ENRIQUEZ would on this one event alone be in violation of §848 and arguably would be convicted on the same and, indeed, there would be a surplusage of eight telephone calls in such an example. (RT 33: 35-36, August 8, 1979) Further, in that example, the Government would at least have $20,000.00 in income which well could be termed substantial and also would have LEONARD ENRIQUEZ in actual

possession of cocaine and involved in the distribution of the same. In fact, LEONARD ENRIQUEZ was convicted of eleven counts of use of a communication facility to facilitate a conspiracy. No substantial income derived from those telephone calls was proved. No possession or distribution was shown. Other examples could be given which would illustrate the misapplication of the law when a continuing criminal enterprise conviction is based solely on telecommunication counts. Hypothesize the situation where one individual did indeed make the eleven telephone calls in violation of §843(b). He could be found guilty, on that alone, under the Government's theory, of a continuing criminal enterprise. Hypothesize further, however, that this individual had made those eleven calls on the basis of an instruction by one telephone call from his superior in the drug enterprise. His superior could, of course, be convicted of violating §843(b); the superior, however, could not be convicted of violating §848, continuing criminal enterprise. The higher up the enterprise one is, the fewer people one would have to deal with directly. Section 848, as mentioned before, was intended to seek out the individual who conceived and coordinated the enterprise's activity, not an underling who executed orders. United States v. Valenzuela, 596 F.2d 874 (9th Cir. 1979).

In application, therefore, it would appear that an unconstitutional discrimination could easily occur where separate phone calls all in facilitation of a single conspiracy would be a basis for the three or more required violations in order to constitute a continuing criminal enterprise.

One's sense of fairness rebels against the thought that three phone calls could cause an individual to run the risk of a minimum of ten years in prison, or, as here, eleven phone calls resulting in a minimum of thirty years in prison. One senses that Congress meant that three self contained and direct drug violations would subject one to the continuing criminal enterprise penalty of §848. One's conscience does not rebel at the thought that three distributions of controlled drugs would satisfy the §848 penalties.

The only reason one would consider that three telephone calls would be sufficient is that it appears Congress has mandated that conclusion from the literal reading of the law. However, a closer reading would reveal that one's sense of equity is reconcilable with the law as written, for in addition to the requirements already discussed, Congress also mandated that the "continuing series of violations" be "with five or more other persons" and "from which such person obtains substantial income or resources." It was pointed out to the trial court that the telephone calls, the "violation which is a part of a continuing series of violations" was not "in concert with five or more other persons." Each of the telephone calls was with one other person. (RT 33: 27 et seq.) Furthermore, as noted, "the violation is a part of a continuing series of violations . . . from which such person obtained substantial income or resources." Here the violation was a use of a telecommunication facility to facilitate a conspiracy. The continuing series of violations were also different instances of the exact same criminal violation, the use of the telecommunication facility to facilitate a conspiracy. No income at all, substantial or otherwise, was derived from the use of the telecommunication facility. Income may be obtained from the distribution, manufacturing and sale of a controlled substance. Income may be obtained in many other ways. Income is not obtained from the use of a telecommunication facility. The contrary response to this argument would be that this would be too literal a reading of the statute. But it is the very literal reading which would seem to be the only basis for having three telecommunications result in a §848 violation. It is from the continuing series of violations itself, according to the statute's own wording, that one must obtain substantial

income. Substantial income or income of any kind is not obtained from telephone calls in furtherance of a conspiracy, but rather income is obtained from actual distribution, sale or some other activity in regard to the controlled substance. Where the continuing series of violations of which one is convicted is entirely made up of telephone communications no substantial income is obtained, or, less broadly, none was obtained in the facts of this case.

For these reasons, LEONARD ENRIQUEZ would submit that the lower court committed reversible error when it failed to grant his Motion for Judgment of Acquittal in regard to Count 3 since the Government failed to establish the elements of a §848 violation and the law as it was applied resulting in his conviction is invidiously discriminatory and deprives LEONARD ENRIQUEZ of his constitutional rights to equal protection and due process of law.

The Ninth Circuit in its memorandum opinion cursorily deals with and disposes of this entire issue by a sentence which manages, despite its brevity, to misstate the position of Petitioner: "Appellant LEONARD ENRIQUEZ provides no basis for his contention that 21 U.S.C. §843(b) is an implicit exception to the definition of a continuing criminal enterprise in 21 U.S.C. §848(b)."

Petitioner LEONARD ENRIQUEZ nowhere argues that §843 (b) is an "implicit exception" to anything. Petitioner argues that the prosecutor, the trial court and now the Ninth Circuit have misinterpreted the statute and that the proof at trial did not establish the Congressionally mandated elements of the crime of which he was convicted. No one--court, prosecutor or defense--was able to come up with a single other instance of where §848 had been so applied to an individual. If the appeal process is to be more than an expensive sound and fury signifying nothing, the Petitioner is entitled at the least to have the issues addressed which he raises. Petitioner would respectfully request

this Court to address this question of first impression of statutory interpretation of 21 U.S.C. §848 as related to 21 U.S.C. §843(b).

ARGUMENT II

WHETHER THE NINTH CIRCUIT COURT OF APPEALS RENDERED A DECISION IN CONFLICT BOTH WITH THE DECISIONS OF THE OTHER COURTS OF APPEAL AND THE APPLICABLE DECISIONS OF THIS COURT IN VIOLATION OF PETITIONER LEONARD ENRIQUEZ'S RIGHT TO BE FREE FROM UNREASONABLE SEARCHES AND SEIZURES CONSTITUTIONALLY GUARANTEED BY THE FOURTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES WHEN SAID COURT:

A) UPHELD THE PROPRIETY OF ADMISSION INTO EVIDENCE OF THE CONTENTS OF TELEPHONE CONVERSATIONS OBTAINED PURSUANT TO ELECTRONIC SURVEILLANCE, THE AUTHORIZATION FOR WHICH CAME FROM A FEDERAL JUDGE WHO WAS PRESENTED WITH SWORN AFFIDAVITS BY OFFICIALS OF THE DRUG ENFORCEMENT ADMINISTRATION WHICH SPECIFICALLY WITHHELD FROM THE JUDGE THE TOTALITY OF THE ORDINARY PROCEDURES USED AGAINST THE PETITIONER INCLUDING A TRANSACTION IN WHICH THE FEDERAL AGENTS SUCCESSFULLY INVOLVED PETITIONER IN A COCAINE TRANSACTION AND ALSO WITHHELD FROM THE JUDGE THAT A SURVEILLANCE APARTMENT HAD BEEN SUCCESSFULLY ESTABLISHED FOR OBSERVATION OF THE RESIDENCE OF PETITIONER AND WHERE THE REMAINDER OF THE AFFIDAVITS CONSISTED OF STATEMENTS, UNSUPPORTED BY ADEQUATE FACTS, THAT OTHER METHODS HAD BEEN TRIED, FAILED OR WERE UNLIKELY TO SUCCEED OR WERE TOO DANGEROUS AND WHERE THE VAST PREPONDERANCE OF SAID STATEMENTS APPLIED OR RELATED TO INDIVIDUALS OTHER THAN PETITIONER?

B) UPHELD THE DENIAL OF A HEARING UNDER THE DOCTRINE OF FRANKS V. DELAWARE WHERE THE AFFIDAVITS SUBMITTED IN SUPPORT OF THE PETITION FOR WIRE TAP AUTHORIZATION CONTAINED FACTS WHICH WERE INTENTIONALLY OR RECKLESSLY FALSE OR OMITTED FACTS WHICH MADE THE STATEMENTS CONTAINED RECKLESSLY OR INTENTIONALLY FALSE, INCLUDING OMISSIONS REGARDING BOTH A SUCCESSFUL COCAINE TRANSACTION INSTITUTED BY GOVERNMENT AGENTS INVOLVING PETITIONER AND THE SUCCESSFUL ESTABLISHMENT OF A SURVEILLANCE APARTMENT ON PETITIONER'S RESIDENCE AND WHEN THE REMAINDER OF THE AFFIDAVITS, AFTER THE REMOVAL OF THE FALSE MATERIAL, FAILED TO ESTABLISH THAT ORDINARY PROCEDURES WOULD BE INADEQUATE?

C) UPHELD THE ADMISSION INTO EVIDENCE OF THE CONTENTS OF TELEPHONE CONVERSATIONS OBTAINED THROUGH ELECTRONIC SURVEILLANCE WHERE PRIOR TO THE AUTHORIZATION OF THE WIRE TAPS BY THE FEDERAL JUDGE, THE DRUG ENFORCEMENT ADMINISTRATION OBTAINED, THROUGH USE OF ITS OWN ADMINISTRATIVE SUBPOENAS, CABLE AND PAIR INFORMATION FROM THE TELEPHONE COMPANY AND WAS ON THE SITE OF SAID CABLE INSTALLATION, ALL IN VIOLATION OF 18 U.S.C. §2510 ET SEQ., WHICH PROHIBIT ADMISSION INTO EVIDENCE OF INFORMATION OBTAINED PURSUANT TO ELECTRONIC SURVEILLANCE WHERE EVEN THE "ENDEAVOR" WAS MADE PRIOR TO THE COURT AUTHORIZATION OF THE SURVEILLANCE?

D) UPHELD THE USE AT TRIAL OF TELEPHONE CONVERSATIONS OBTAINED PURSUANT TO ELECTRONIC SURVEILLANCE, THE CONVERSATIONS HAVING BEEN PRESENTED ON COMPOSITE TAPES, NOT MADE FROM THE ORIGINAL TAPES WITH NONE OF THE TAPES OR COPIES THEREOF HAVING BEEN SEALED UNDER THE DIRECTION OF THE JUDGE AND WHERE THERE WERE DISCREPANCIES BETWEEN THE ORIGINAL TAPES AND THE COMPOSITE TAPES USED AT TRIAL, ALL IN VIOLATION OF 18 U.S.C. §2510 ET SEQ.?

The Congress, in 18 U.S.C. §2510 et seq., set forth certain prohibitions and procedures governing the interception of all communications. In §2518 is contained the specific undertakings, findings and avowals which must be made by both applicant and court in order to legitimately intercept oral communications.

Under the statute, for the court to order the issuance of the Statutory Order of Authorization, it is necessary for the court to find, as follows, in relevant part: "(c) Normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous;" 18 U.S.C. §2518(3)(c). An aggrieved person under the statute is given the right to move to suppress the contents of any intercepted communication on the grounds that the communication was unlawfully intercepted or the Order of Authorization or approval was insufficient on its face. 18 U.S.C. §2518(10)(a)(i) and (ii) It is further provided in the statute that the contents of an intercepted communication and any evidence derived therefrom may not be used if the disclosure of that information would be in violation of the chapter. 18 U.S.C. §2515 The statutes as written do not authorize expansive use of wire taps nor does the statute in any way facilitate or justify wire tap use as a regular and ordinary means of law enforcement. Clearly, Congress sought to limit the use of electronic surveillance. United States v. Santora, 600 F.2d 1317 (9th Cir. 1979). The "highly intrusive nature" of wire taps led to a congressional requirement that wire taps "not be resorted to in situations where traditional investigative techniques would suffice to expose the crime." United States v. Bailey, 607 F.2d 237, 241 (9th Cir. 1979).

The affidavit in support of the request for the wire tap must provide a factual basis that ordinary investigative procedures have failed or will fail, and an affidavit filled with

conclusions and not containing particular facts gives no basis for a judicial determination of statutory compliance. United States v. Spagnuolo, 549 F.2d 705, 710 (9th Cir. 1977). If the affidavit takes the position that ordinary techniques have been tried and have failed, then the affidavit must "reveal" those same failed techniques and that the technique has been employed in a good faith effort to determine the identity of those violating the law to assemble sufficient evidence to justify their prosecution and that these efforts have failed to achieve their ends. United States v. Spagnuolo, supra at 710. While an exhaustion of all resources is not required, the good faith efforts must reveal normal techniques "employing a normal amount of resources" has not established the case "in a reasonable amount of time." United States v. Spagnuolo, supra at 710.

If the position in the affidavit is that ordinary techniques will not work or are too dangerous, then the affiant must show a sufficient factual history of the investigation and a description of the criminal enterprise, which would justify the judge in reaching the same conclusion reached by the affiant and the factual recitation must be such that the judge is able to so determine based on the facts contained in the affidavit, and not on a recitation of the affiant's assertions regarding his or other agents experiences. United States v. Spagnuolo, supra at 710.

While it is undisputed that the statute and the cases do not require "the indiscriminate pursuit to the bitter end of every non-electronic device as to every telephone and principal in question to a point where the investigation become redundant or impractical or the subjects may be alerted and the entire investigation aborted by unreasonable insistence on forlorn hope," United States v. Baker, 589 F.2d 1008, 1013 (9th Cir. 1979), still the "necessity for the wire tap must be readily apparent from the

affidavit." United States v. Bailey, supra at 242. The Baker court set forth a full statement of why the affidavit was in that case adequate. LEONARD ENRIQUEZ would set forth that statement by the Ninth Circuit herein inasmuch as the facts in this case, as will be brought out, fails to pass muster at almost every point. The Ninth Circuit wrote:

> It was not comprised of mere "boiler plate," conclusary language, circumstances that would apply to problems that could be expected in the investigation of ordinary gambling cases, the stretching of a single investigative episode into "a full and complete statement," or undue reliance upon the investigator's experience in other cases. It "etched the nature and contours" of this particular gambling business from the statements of reliable informants who had first hand knowledge but who were afraid and would refuse to testify in court, as well as "the nature and extent of this investigation up to the requesting point with enough particularity to allow a judge reasonably to ascertain the continued use of ordinary surveillance probably would be fruitless." United States v. Baker, supra at 1011.

The Ninth Circuit further suggests in United States v. Spagnuolo, supra at 710, that the factual basis for the affidavit may be set out by "descriptions of the particular illicit operation's peculiarities which necessitate a wire tap." Since the statutory mandate is that in non-peculiar situations electric surveillance is not permissible, the Spagnuolo court's position is most reasonable in suggesting that the peculiarities in the particular case are those factual circumstances which may readily provide support for the need for electronic surveillance. If the Congress had intended wire taps would be allowed simply because inherent in the nature of drug trafficking are certain difficulties, the Congress could have explicitly exempted drug trafficking operations from the general mandate of §2510 et seq. Congress did not elect to do so. Therefore, it is incumbent upon the affiant to show why the situation in this particular case is so peculiar as to require a wire tap. A review of the

three Affidavits fails to reveal any fact or peculiarity to the instant conspiracy and drug trafficking operation that cannot be found in any other narcotic conspiracy or operation which the Government has been successfully prosecuting for years without the use of wire taps. The use of wire taps may considerable expedite the Government's investigation, but expediency alone has never been deemed sufficient grounds for discarding the requirements set down by the law.

It is also the rule that because the factual adequacy for the wire taps has been established in regard to one individual or one member of a conspiracy, it does not at all follow therefrom that a factual adequacy has been established in regard to other telephones or other individuals. United States v. Baker, supra at 1012. As the Ninth Circuit noted in the first Santora opinion, United States v. Santora, 583 F.2d 453, 466 (9th Cir. 1978), quoting United States v. Abascal, 564 F.2d 821 (9th Cir. 1977) at 826: "Less intrusive investigative procedures may succeed with one putative participant while they may not succeed with another."

An accused is further entitled to a hearing regarding the sufficiency of the affidavit where he makes specific allegations of intentional or reckless falsehood in an affidavit, accompanies this by sworn affidavit of supporting reasons and if, when the statements which are the subject of the falsification charges are removed from the affidavit, there does not remain sufficient information in the affidavit to support the issuance of the warrant. Franks v. Delaware, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978). This procedure is also applied to an affidavit in support of electronic surveillance. United States V. Licavoli, 604 F.2d 613, 621 (9th Cir. 1979).

In this case, Affidavits were submitted in support of each application for a wire tap in this matter: March 21, 1978, April 13, 1978 and May 5, 1978. The March and April wire taps were on the phone of ARNOLD ENRIQUEZ, brother of Petitioner. The May wire tap was on the phone of VIRGINIA RAMIREZ, with whom Petitioner resided.

In the March Affidavit, the factual recitation of alleged insufficiency of normal investigative procedure begins with paragraph 44. The April Affidavit for the second wire tap incorporates by reference the same paragraphs 44-54 of the March Affidavit. The May Affidavit incorporates paragraphs 44-54 of the first March Affidavit as well as paragraphs 5-11 of the April Affidavit.

Paragraph 44: Any inference contained in paragraph 44 that insufficient evidence had been obtained is totally misleading in regard to the incorporation of said paragraph in the April Affidavit and even more misleading in regard to the May Affidavit inasmuch as extensive information and quite sufficient evidence both to indict and convict had been obtained through the prior electronic surveillance if not by the time of the April Affidavit, then certainly by the time of the May Affidavit. Specifically, sufficient information had been obtained in regard to LEONARD ENRIQUEZ prior to the May 2 Affidavit. Further this paragraph is soley composed of legal conclusions and provides no factual basis on which the court could make its decision.

Paragraph 45: This paragraph indicates that the informers were unwilling to testify out of fear. There is no factual basis of any threats by any of the suspects against the informants or against any other persons. Further, there are absolutely no facts that show LEONARD ENRIQUEZ was the source of this fear nor are there any facts which set forth that these informants gave any information in regard to LEONARD ENRIQUEZ. There is no factual basis for a conclusion that the Government even attempted to use

informants in regard to LEONARD ENRIQUEZ.

Paragraph 46: This refers to unsuccessful surveillance of ARNOLD ENRIQUEZ'S residence. To the extent this attempt was made, the affiant contradicts herself by stating in paragraph 48 of this same Affidavit that vehicles had been observed at the ENRIQUEZ residence, that said vehicles had been identified and are registered to known narcotics users. Thus, successful surveillance was able to be done at the residence of ARNOLD DURAN ENRIQUEZ. Further, while the affiant claims to have personally attempted surveillance she makes a clear misstatement of fact by indicating that the residence has an unobstructed view of all intersections. This statement is completely false as evidenced by Exhibit 2 of the Motion to Suppress of Defendant LANGE (CR 290). Further the surveillance of ARNOLD ENRIQUEZ does not in any way relate to a surveillance of LEONARD ENRIQUEZ upon whom the third wire tap was undertaken. Furthermore, none of the three Affidavits mention it, but a surveillance apartment was established across the alley from the residence of LEONARD ENRIQUEZ. This apartment was established at an unspecified time prior to the Affidavit in regard to the third wire tap. (RT 26:163-65, 176-78) Clearly this establishment of a surveillance apartment on LEONARD ENRIQUEZ was the omission of a material fact by the affiant. There is, of course, no indication in the Affidavit that surveillance of LEONARD ENRIQUEZ was unsuccessful.

Paragraph 47: This paragraph states that because of a prior case regarding LEONARD ENRIQUEZ, ARNOLD ENRIQUEZ had extensive knowledge of surveillance and investigative techniques and knew most of the personnel of the Drug Enforcement Administration. This statement is rebutted by the fact that the affiant herself, LAURA GARCIA, infiltrated the ARNOLD ENRIQUEZ organization and purchased drugs directly from ARNOLD ENRIQUEZ herself as stated in the Affidavit. Further, on April 5, 1978, the Drug Enforcement

Administration instigated a transaction whereby mannite was exchanged for cocaine in the presence of LEONARD ENRIQUEZ. (RT 25:60 et seq.) No other information is given in the Affidavit which would show attempts to take further advantage of dealings or transactions with LEONARD ENRIQUEZ. The affiant conveniently fails to bring this information before the judge in her Affidavits.

Paragraph 48: This paragraph relates that the affiant has surveiled the residence of ARNOLD ENRIQUEZ and has observed vehicles registered to individuals suspected of involvement in narcotics trafficking. The affiant states that this surveillance information obtained has not led to the nature of the relationship or involvement with ARNOLD ENRIQUEZ. However no statement is made that any attempt was made to follow up on such information obtained. All this paragraph does is to show that when surveillance was attempted it was successful.

Paragraph 49: Paragraph 49 contains beliefs of the affiant and the Assistant United States Attorney that a grand jury investigation would not be successful. The reasons set forth in this case are no different than in any other criminal matter. All criminal defendants do have fifth amendment rights and may refuse to testify. This does not distinguish this case from any other criminal action. The other paragraphs refer to lack of information in order to offer immunity, lack of information to test cooperation, and the conclusion that fear of ARNOLD ENRIQUEZ would cause potential witnesses to face contempt charges rather than relay information. Factually by the time of the application of the third wire tap there was an abundance of information in which to decide these matters, by the time of the application for the second wire tap there was considerable information and at the time of the application for all the wire taps there had been no demonstration that there was use and failure or likelihood of failure of ordinary investigative procedures. The remaining parts of paragraph 49 deal with the beliefs of the affiant and no factual basis is set forth.

Paragraph 50: This paragraph recites the affiant's general experience in regard to the success of raids or searches and that records are probably not kept or are inadequate. This argument is not persuasive. In a drug trafficking operation there must be drug traffic. The subject matter of this traffic could not so easily be destroyed. Further any statements made in this paragraph would hardly be unique to this particular conspiracy or be one of the peculiarities of this conspiracy. Moreover, by the time this statement was incorporated in the application and Affidavit for the wire tap on the phone of LEONARD ENRIQUEZ the Government did have the names of the participants, as well as the sources and methods, all of which were reflected in the conversations overheard in the earlier wire taps. This paragraph does not at all support the claim that ordinary techniques have or would fail.

Paragraph 51: This paragraph reflects a decision to eliminate a use of a body bug to discover evidence since it would identify cooperating individuals. It contains no facts to show that the method would not work. Witness LAURA GARCIA was not so concerned with hiding identity when informer two accompanied her to purchase drugs from ARNOLD ENRIQUEZ. The conclusion from this is that the procedure was never attempted. Specifically the Affidavit does not indicate any attempt made to deal with LEONARD ENRIQUEZ. The fact is that on the one occasion, the mannite-cocaine transaction, where the Government did attempt to infiltrate in regard to LEONARD ENRIQUEZ the Government met with complete success. No part of the Affidavit indicates that any follow up was made to this attempt.

Paragraph 52: This recites that certain efforts since 1974 of pentration have failed, and concludes that other efforts would be unsuccessful. The paragraph omits the fact that cocaine was obtained from LEONARD ENRIQUEZ in April, 1978. The paragraph

does not state that any further effort was made to purchase from LEONARD ENRIQUEZ. It does not indicate that any effort was made in regard to any of the numerous other Co-Defendants.

Paragraphs 53 & 54: These paragraphs indicate the telephone call records and the pen register have failed to reveal identities of parties to the conversations or the nature of the conversations. However, at the time of the application for the wire tap, nearly all other investigative means remained yet to be utilized and at the time of the applications for the second and third wire taps, this information clearly was in the possession of the Government.

An analysis of this Affidavit for the first wire tap would lead to the conclusion that all normal investigative procedures actually used were successful and that for reasons unknown the Government abandoned the efforts without fully or even partially exploring their possibilities. For instance, a purchase was directly made from ARNOLD ENRIQUEZ and no attempts were made to infiltrate the organization at any other level. The sole known attempt at infiltration in regard to ARNOLD ENRIQUEZ was fully successful. Surveillance of individual vehicles arriving and leaving at the ARNOLD ENRIQUEZ residence was successful. The actions of the Government in this matter do not meet the standards as established by the cases which have been set forth herein. The Government hardly demonstrates "good faith effort" when after all normal surveillance techniques used have been successful, it concludes that they were not, and when other normal surveillance techniques have not yet even been attempted, that there is need for the use of electronic surveillance. Electronic surveillance certainly makes the Drug Enforcement Administration's job easier, but the Congress clearly did not have the ease of the Drug Enforcement Administration in mind when it established the standards for electronic surveillance authorization.

The affidavit of April 13 sets forth a need for continued interception and the failure of ordinary techniques in paragraphs 5-11 thereof.

Paragraph 5: This paragraph incorporates paragraphs 44-54 of the March Affidavit and sets out conclusions that normal investigative procedures would not be successful. It is of no legal significance.

Paragraph 6: Paragraph 6 sets forth information which at the time of the second Affidavit the Government claimed it still lacked in order to complete this investigation. Assuming the Government was still in need of the information, paragraph 6 in no way provides a factual basis to conclude that normal investigative procedures would not have been successful if tried or pursued. Paragraph 6 does not go towards a factual basis arising out of the peculiarities of this particular drug trafficking conspiracy which would require the use of electronic surveillance. By the time of the Affidavit in regard to the third wire tap in May, this paragraph 6 which was incorporated was totally untrue inasmuch as the Government at that time had full information to convict every named participant in the conspiracy.

Paragraph 7: This paragraph relates two occasions where ARNOLD ENRIQUEZ was followed and lost by those who were doing the surveillance. Nowhere does it indicate that surveillance ever was undertaken on LEONARD ENRIQUEZ. Nowhere does it indicate that ordinary surveillance on other members of the organization had been attempted. If the Government only tried to follow ARNOLD ENRIQUEZ twice that was an inadequate attempt to normal investigative techniques. If the Government tried to surveil ARNOLD ENRIQUEZ more than twice, the Affidavit fails to set forth that fact, a material omission. Because the Government is not one hundred percent successful in its normal surveillance does not entitle it to obtain wire tap authorization.

Paragraph 8: It states that previous telecommunication interceptions have revealed information but that the Government still does not have all the information it desires. This is not a justification for further wire tapping. The affiant is required to set forth a factual basis why ordinary procedures would be unsuccessful.

Paragraph 9: Paragraph 9 states that the informants have not expressed willingness to testify or wear body recorders. The Affidavit does not state that the informers were approached or requested to do the same, nor does it state that they ever refused to do the same.

Paragraph 10: This paragraph concludes that undercover penetration would not likely be successful since the organization involves too many people. The fact that the theoretical penetration, if none was actually attempted, would be unsuccessful is a conclusion on the part of the affiant and has no legal significance and the fact that the organization involves many people would seem to increase the likelihood that penetration, if the Government would attempt it, could be successful.

Paragraph 11: It indicates that a grand jury investigation on a grant of immunity would not be successful because the ENRIQUEZ organization has a reputation for violence. This statement has no basis in fact and is a conclusion on the part of the affiant. In addition, by the time of the application for the third wire tap, without question the Government had all the information it needed.

The Affidavit of May 5, in support of the order granted on May 2, alleges a need for interception of the telephone of LEONARD ENRIQUEZ, incorporates the relevant parts of the preceding Affidavits and argues the failure of ordinary techniques in paragraphs 7-17 thereof.

Paragraph 7: This paragraph is a simple incorporation of the relevant paragraphs of the March and April Affidavits.

Paragraph 8: This is a paragraph of general conclusions that normal investigative procedures have not worked and will not work. It is of no legal significance.

Paragraph 9: This paragraph alleges that the Drug Enforcement Administration still has insufficient information. It in no way sets forth a factual basis why it could not achieve the information it desires regarding LEONARD ENRIQUEZ through ordinary procedures.

Paragraph 10: This paragraph, amazingly enough, sets forth as a factual basis why electronic surveillance should be authorized the fact that LEONARD ENRIQUEZ made three telephone calls to Mexico. This clearly is of no significance.

Paragraph 11: Paragraph 11 indicates that the "slang terms or code words complicates interception necessitating longer interceptions." Anyone at all familiar, as the Drug Enforcement Adminstration presumably is, with the normal drug terminology used would have no difficulty interpreting what was said. The Government witness at the trial testified that he had no problems interpreting the words or explaining them. (RT 3:91)

Paragraph 12: This paragraph again indicates none of the informers had expressed a willingness to testify and that the members of the ENRIQUEZ organization were extremely cautious. Again no factual basis is given if informants were ever asked to testify. There is, further, no indication that these informants had anything to do with LEONARD ENIQUEZ.

Paragraph 13: The affiant states that LEONARD ENRIQUEZ was difficult to surveil in the 1974 investigation. The affiant totally ignores and fails to bring to the court's attention the trial testimony by a Government agent that a surveillance apartment had been established on LEONARD ENRIQUEZ at an unspecified time

maintained during the wire taps. No information was given as to the success or lack of success of the apartment surveillance which was not brought to the judge's attention. One can only conclude that this was a deliberate omission on the part of the affiant for, if the affiant recalls the difficulties of the 1974 surveillance, certainly she should at that time recall that a present surveillance was ongoing.

Paragraph 14: This again states that recent unspecified efforts at surveillance were unsuccessful and cites one instance where he was not observed. Once again it is not brought to the judge's attention that a surveillance apartment had been established and it was not until the time of the trial, one year later, that Defendant and defense attorneys learned of this surveillance apartment. (RT 26:163)

Paragraph 15: This paragraph concludes that undercover penetration would be unsuccessful again because too many people are involved and the ENRIQUEZ organization is careful and circumspect in their dealings. This statement is false and misleading and subject to the comments that have been made in regard to the same statements in the preceding Affidavits and, of course, it grossly omits the fact the Drug Enforcement Administration had no problem whatever in the preceding month of infiltrating and catching "red handed" LEONARD ENRIQUEZ through the MARK FINE mannite-cocaine transaction it instigated.

Paragraph 16: This paragraph states that ARNOLD ENRIQUEZ may keep unknown quantities of controlled substances at his residence but that it is the experience of the affiant and others that records are not maintained or if maintained would be insufficient. This statement on the part of the affiant deals exclusively with ARNOLD ENRIQUEZ and it has nothing to do with LEONARD ENRIQUEZ, upon whose phone the affiant seeks authorization to conduct electronic surveillance. There is no evidence of any use of normal

investigative procedures in regard to LEONARD ENRIQUEZ.

Paragraph 17: This paragraph states that the ENRIQUEZ organization had a reputation for violence. The paragraph is a conclusion on the part of the affiant, no factual basis is set forth, and more specifically, no factual basis is set forth in regard to LEONARD ENRIQUEZ.

A review of this third Affidavit thus reveals little information that is new and not contained in the previous Affidavits. Further, nearly the entire body of information contained relates to ARNOLD ENRIQUEZ, not LEONARD ENRIQUEZ. Where an Affidavit fails to indicate efforts directed at individuals whose phones are to be tapped and relies by incorporation of affidavits directed at others, there is insufficient showing under §2518(1)(c). United States v. Santora, supra at 1322. Clearly, all of the Affidavits show a complete lack of use of ordinary means of investigation by the Drug Enforcement Administration. One would also find that on those instances where ordinary surveillance was undertaken, surveillance was almost always successful.

In summation, all of the Affidavits were conclusory, grossly misleading through omission, contained misstatements or did not apply to Petitioner LEONARD ENRIQUEZ.

The Brief of the Government to the Ninth Circuit avoided this paragraph by paragraph approath, argues that the Affidavits must be viewed as a whole, and sets out an impressive series of legal citations. Tactically this method allowed the Government to make the best case for its position. The weakness of this wholistic approach is that, under scrutiny, it fails to confront the issues. Petitioner does not quarrel with the Government's legal citations--indeed, Petitioner in his Brief cited many of the same cases. Petitioner, however, submits that the facts of this case do not meet the standards set down in the Government's own citations.

The Government begins its Brief with cited argument that discretion must be given to the District Court judge in regard to the sufficiency of the Affidavits. What the Government ignores, while hiding behind this verity, is that the Affidavits were found to be sufficient by the issuing judge when, among other things, he was not even apprised of significant facts, for example, the Petitioner LEONARD ENRIQUEZ had been personally involved during the course of the wire taps in a cocaine transaction arranged by the Government itself using a Government informer. Further the judge was not informed that a surveillance post had been established on the apartment of LEONARD ENRIQUEZ. These are indisputably very material facts. One searches in vain to find these very material facts having been brought before the judge through the Affidavits. The discretion to be exercised by the judge presumably should be informed discretion, not discretion in vacuo.

As the Ninth Circuit said in United States v. Baker, supra at 1011, the affidavit must include ". . . the nature and extent of this investigation up to the requesting point with enough particularity to allow a judge reasonably to ascertain the continued use of ordinary surveillance probably would be fruitless." It would be impossible for an officer of the court to argue that the standard was met in this case. As a result, the Government does not even confront the issues in its Brief to the Ninth Circuit. It mentions the event of the cocaine transaction and the surveillance apartment in its Statement of Facts, but nowhere in its discussion of the issues does it try to resolve the omission. One does not disagree with the Government's cited contentions that the lower court has discretion; one does disagree with the omission from the Affidavit of events clearly relevant and significant which would have had an effect on the exercise of discretion by the lower court judge. Since wire interceptions may be utilized only when traditional methods would be unsuccessful,

18 U.S.C. §2518(3)(c), the withholding of successful traditional methods from the judge's knowledge defeats the arguments that the Affidavits here were sufficient to authorize wire taps.

The problem for the Government is that its position is weakened by the facts. Even with the minimal amount of traditional resources used by the Drug Enforcement Administration--instead of the "normal amount" as required by United States v. Spagnuolo, supra at 710--the Government's argument is hampered at every turn by the fact that traditional methods resulted in almost unrelieved success. The Affidavits are almost devoid of traditional methods used against LEONARD ENRIQUEZ which failed. Review of the Affidavits also reveals that most of the traditional methods which were used were directed not at LEONARD ENRIQUEZ but at ARNOLD ENRIQUEZ. Numerous cases support the position that where wire tapping may be necessary for one individual it does not follow this more intrusive method is appropriate for another individual. United States v. Baker, supra at 1012; United States v. Santora, supra at 466; United States v. Abascal, supra at 826.

Review of the Affidavits themselves, in light of the paragraph by paragraph analysis, such as was contained in Petitioner's Opening Brief, would lead to the conclusion that the Government did not fulfill its responsibility in regard to the use of traditional methods. This belief is strengthened by the Government's refusal, perhaps inability, to provide detailed support for the Affidavits, but instead arguing that one must review the Affidavits as a whole. But overall impression is of little import when close scrutiny reveals in the carefully worded Affidavits that almost no effort was made in regard to LEONARD ENRIQUEZ and that those efforts which were made were successful, and that the Affidavits themselves totally and almost certainly intentionally omit other significant efforts.

On February 16, 1979, the Motion to Suppress of all Defendants was denied. (CR 315) In that order, the court also found that the Defendants failed to come forth with sufficient information to justify a hearing under the doctrine of Franks v. Delaware, supra. Petitioner would submit that in view of the misrepresentations, omissions, fabrications and inaccuracies contained within the Affidavits in support of the wire taps, as pointed out hereinabove, and as documented by Defendants' Affidavits (CR 309), and as argued at the time of the hearing, together with the intentional or reckless omission of material facts regarding both the apartment surveillance which had been undertaken in regard to LEONARD ENRIQUEZ and the mannite-cocaine transfer in which LEONARD ENRIQUEZ was involved in the presence of Government witnesses, which events were not brought to the judge's attention, Petitioner would submit that a sufficient basis was established under Franks v. Delaware. There was false and reckless statements in the Affidavits and, when these statements are removed, there is established a need for a hearing at which the adequacy of the Affidavits would be tested.

The Ninth Circuit in its Memorandum Opinion, the inadequacy of which would make a good paralegal blush and which reads like a hornbook in its total failure to address the issues raised in the context of the facts presented, noted, ". . . each affidavit contained statements relating in detail why normal investigative procedures were inadequate, not reasonably likely to succeed, or too dangerous." Petitioner would agree that the Affidavits did contain statements to that effect; what the Affidavits did not contain were facts to support those statements.

The Ninth Circuit goes on to note that the authorizing judge required regular reports on the progress made in the wire tap investigation and that the authorizing judge has considerable discretion as to the adequacy of the showing of necessity. Unfor-

tunately the "regular reports" did not inform the authorizing judge that the Drug Enforcement Administration successfully purchased cocaine from Petitioner and did not inform the authorizing judge that a surveillance apartment had been established on the residence of Petitioner. Did the Ninth Circuit even need the Briefs submitted by Petitioner? Is no one concerned that the Drug Enforcement Administration withheld vital information from the authorizing judge? Is zealotry in the pursuit of drug dealers an end so great that the federal judiciary will sanction its own manipulation by the Drug Enforcement Administration without so much as a murmur of protest?

In summary, Petitioner LEONARD ENRIQUEZ would submit that the Motions to Suppress should have been granted, the conviction overturned and the matter remanded to the trial court inasmuch as the Affidavits in support thereof wholly failed to set forth the factual peculiarities of the investigation and failed to show that ordinary investigative procedures would be unsuccessful and that further there was a factual basis lacking throughout all of the Affidavits and that they were conclusory in nature. In addition, under the doctrine of Franks v. Delaware, LEONARD ENRIQUEZ was entitled to a hearing to test the sufficiency of the Affidavits as a result of the intentional and recklessly false statements and omissions contained within the Affidavits.

Inadequacy of the Affidavits was not the only reason information derived from the wire taps should not have been admitted. 18 U.S.C. §2515 prohibits disclosure of any information which would be in violation of that statute. Disclosure may be made when the information is received pursuant to the statute according to 18 U.S.C. §2517. Two means are provided for a communication common carrier to provide information: Under §2511(2)(a)(ii) it is permitted that a common carrier disclose information to a law enforcement officer who has a court authorized wire tap, and, under §2518

(4), the wire tap authorization itself may direct the agent of the communication common carrier to provide information. The facts in this case show that the information regarding cable and pair was not provided by court order but by administrative subpoena. This is not in conformity with the two means allowed by the statute. Therefore, any information derived, according to 18 U.S.C. §2515, should not be received into evidence.

There is no dispute, furthermore, that actions taken before an actual interception or preparatory to it fall within the control of the statute. In White v. Weiss, 535 F.2d 1067 (8th Cir. 1976), the court held that the actions of a private detective in obtaining and providing wire tapping equipment for his client and instructing her in its manner of usage were within the scope of the wire tap statute although the detective did not personally hear or intercept any conversations and his actions occurred prior to the interception of any conversations. It is not necessary that there even be an interception or any phone calls made on the tapped line; the statute is violated when steps are taken towards an interception. United States v. McIntyre, 582 F.2d 1221 (9th Cir. 1978). Further, the seriousness with which this matter is viewed by Congress is evident by 18 U.S.C. §2511(1)(a) which makes a criminal act out of intercepting or "endeavoring" to intercept "except as otherwise specifically provided."

Since the Government was clearly endeavoring, as shown at trial and as set forth in the Statement of Facts, to intercept conversations, within the meaning of the statute and the clear ordinary English import of those words, by its acquisition of cable and pair information, and such information was obtained prior to any court authorization for the same and was obtained in a manner outside the permissible avenues allowed by the quoted statute, and, in addition, since the information obtained was

information which would be within the reasonable expectation of privacy of the individual, LEONARD ENRIQUEZ would submit that the reception into evidence of information derived therefrom was inappropriate.

The final problem in regard to the use of the wire tapped information concerned the three sets of tapes which were recorded by the Drug Enforcement Administration in this case and which were called, respectively, the original tapes, the duplicate original tapes and the work tapes. (RT 14:33-34) The Government witness testified that the set of tapes used to make the composite tapes were not the originals but the "duplicate originals." (RT 13:164) The witness further testified that the duplicate tapes from which the composite tapes submitted at trial were made had never been brought before the judge and never had been sealed. (RT 13:180) Another Government witness testified that duplicate tapes from which the trial composite tapes were made were "borrowed from time to time." And he had no knowledge what was done with them during this period. (RT 14:46) The original tapes were sealed by the Drug Enforcement Administration, not under the direction of the Judge. (RT 13:159-62; 189) Further, some discrepancies were found between the originals and the duplicates and composites. (RT 24: 93-95)

The relevant section of the statute, 18 U.S.C. §2518 (8)(a) provides as follows:

> Immediately upon the expiration of the period of the Order, or extensions thereof, such recording shall be made available to the judge issuing such Order and sealed under his directions. . . . Duplicate recordings may be made for use or disclosure pursuant to the provisions of subsections (1) and (2) of §2517 of this chapter for investigations. The presence of the seal provided for by this subsection, or a satisfactory explanation for the absence thereof, shall be a prerequisite for the use or disclosure of the contents of any wire or oral communication or evidence derived therefrom under subsection (3) of §2517.

Petitioner LEONARD ENRIQUEZ has made a two-fold objection to the noncompliance of the Government with the statutes:

1. The original tapes were not sealed under the direction of the judge as required by the statute, and

2. Duplicate tapes were made and used not as allowed by statute but for the preparation of a composite tape for use at trial.

The statute clearly provides that the tapes shall be sealed under the direction of the judge, as a prerequisite to their admissibility. The trial court found it to be a "satisfactory explanation" for the absence of a statutorily required seal that the Government wanted to preserve the integrity of the originals. (RT 24:92) Obviously, this could be said in any such case and amounts to judicial emasculation of the legislation. Other courts, of course, have been more demanding of the Government. For instance, the Seventh Circuit has found that a "satisfactory explanation" is where the Government shows it acted with dispatch and diligence and mindful of both the letter and the spirit of the statute. United States v. Angelini, 565 F.2d 469 (7th Cir.), cert. denied 435 U.S. 923, 98 S.Ct. 1487, 55 L.Ed.2d 517 (1977). No one could contend here that the Government was mindful of the letter of the law where it introduced a composite made from duplicates into evidence and where it did not even seal any of the tapes under direction from the judge. Clearly, failure to seal as required by the statute requires suppression. Altano v. United States, 555 F.2d 1128 (2nd Cir. 1977), sealing under the requirements of this section being a prerequisite for use. United States v. Gigante, 538 F.2d 502 (2nd Cir. 1976).

The trial court also repeatedly misapplied the phrase "or a satisfactory explanation for the absence thereof" by finding the Government's goal of preservation of the integrity of the tapes adequate reason to allow the Government to use the duplicate tapes which had never been sealed, not the "sealed" originals

(sealed by the Drug Enforcement Administration and not under the direction of the judge) in order to prepare a composite tape for use and which was used at trial. A review of the final section of 18 U.S.C. §2518(8)(a) indicates that a satisfactory explanation could arguably be given for absence of a seal prescribed by the statute. The preceding section setting forth the uses of which duplicate tapes may be used has no such qualification. Thus, the Congress did not give the court any discretion to receive a satisfactory explanation for use of duplicate tapes. Further, the Government said that its desire was to preserve the integrity of the originals. But it is inconceivable to what greater use these sealed originals could be put than to use at the trial of those people whose conversations had been intercepted.

Once again, under the statutes as enacted by the Congress, the information derived from the wire taps in this case would not be admissible. Yet the trial court, contrary to the statute's clear wording, allowed their use and the Ninth Circuit concurred. Petitioner submits that the federal statute has been either misapplied or ignored.

NUMBER _____

IN THE

SUPREME COURT OF THE UNITED STATES

(OCTOBER 1980 TERM)

LEONARD DURAN ENRIQUEZ,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

APPENDIX TO

PETITION FOR WRIT OF CERTIORARI

TO THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SKARECKY & HORENSTEIN
A Professional Association
By DENNIS SKARECKY
3130 N. Third Avenue, #300
Phoenix, AZ 85013
(602) 248-0393
Attorney for Petitioner
LEONARD DURAN ENRIQUEZ

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FILED

MAR 24 1981

RICHARD H. DEANE
CLERK U.S. COURT OF APPEALS

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee,	)	Nos. 79-1714; 79-1715; 79-1716; 79-1717; 79-1718; 79-1719; 79-1722
v.	)	D.C. # CR 78-287 PHX CAM
LEONARD DURAN ENRIQUEZ, ET AL., Defendants-Appellants.	)	MEMORANDUM

Appeal from the United States District Court
for the District of Arizona
C. A. Muecke, District Judge, Presiding
Argued and submitted November 10, 1980

Before: GOODWIN and SCHROEDER, Circuit Judges and JAMESON*, District Court Judge

This is a drug conspiracy prosecution involving seven out of an original 22 defendants. The appeals arise out of convictions of conspiracy to distribute and possession with intent to distribute heroin and cocaine in violation of 21 U.S.C. § 846 and use of the telephone to facilitate a conspiracy to distribute controlled substances in violation of 21 U.S.C. § 843(b). One of the defendants, Leonard Enriquez, was also convicted of engaging in a continuing criminal enterprise in violation of 21 U.S.C. § 848. Much of the evidence adduced against the appellants was obtained as the result of three separate wiretap authorizations over the course of several months. A number of issues are presented for review.

I. The Wiretaps

Leonard Enriquez argues that an adequate showing of the necessity for the wiretaps was not made as required by 18 U.S.C. § 2518(1)(c). In a similar vein, appellant

*William J. Jameson, Senior District Judge, District of Montana, sitting by designation.

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Glotfelter challenges the necessity of the second and third wiretaps. In this case, each affidavit contained statements relating in detail why normal investigative procedures were inadequate, not reasonably likely to succeed, or too dangerous. Each incorporated the information contained in the prior applications and provided a further update on the investigation. In addition, the authorizing judge required the government to provide regular reports regarding the progress made in the wiretap investigation. The authorizing judge has considerable discretion to determine whether an adequate showing of necessity has been made. United States v. Martin, 599 F.2d 880, 886 (9th Cir.), cert. denied sub nom. Andrews v. United States, 441 U.S. 962 (1979). We find no abuse of discretion here. See United States v. Bailey, 607 F.2d 237 (9th Cir. 1979), cert. denied sub nom. Whitney v. United States, 445 U.S. 934 (1980).

Error is also claimed in the failure to name certain co-defendants as target defendants in subsequent wiretap applications. An agency must name those individuals it has probable cause to believe will be probable conversers engaged in the criminal activity under investigation. United States v. Donovan, 429 U.S. 413, 97 S.Ct. 658 (1977). Both Virginia Ramirez and Alfred Enriquez fall into that class of persons "as yet unknown" for wiretap authorization purposes, however, and therefore they did not have to be named. United States v. Kahn, 415 U.S. 143, 94 S.Ct. 977 (1974).

Leonard Enriquez' argument that he was entitled to a hearing regarding whether the affidavits were intentionally or recklessly false is without merit. The appellants' affidavits are substantially comprised of personal denials of the truth of statements made by agent

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Garcia in the wiretap affidavits. In addition, the oral offers of proof submitted to the district court are cumulative challenges to the government's exhaustion of other investigative possibilities. These affidavits and offers of proof do not make the requisite showing that agent Garcia included deliberate falsehoods or statements in reckless disregard for the truth in her affidavit. No hearing was required. Franks v. Delaware, 438 U.S. 154, 98 S.Ct. 2674 (1978); United States v. Young Buffalo, 591 F.2d 506 (9th Cir.), cert. denied, 441 U.S. 950 (1979).

The appellants' arguments regarding use of composite tapes prepared from duplicate original tapes must be rejected. The district court found the chain of custody showed no alterations or deletions were made to the original, the duplicate original, or composite tapes and, in addition, the sealed originals were available to the defendants.

We reject the appellants' contentions that the wiretapped phone conversations should have been suppressed pursuant to 18 U.S.C. § 2515 because cable and pair information was obtained by subpoena prior to the wiretap order. The subpoenaed cable and pair information identified only the cable and particular wires within the cable which serviced the phones later intercepted pursuant to court order. The appellants cite no persuasive authority to show there was an "interception" of a "wire or oral communication," as those terms are defined by 18 U.S.C. § 2510.

Assertions that the wiretap order was signed three days before the affidavit supporting it are without foundation. The originals on file with the district court indicate both the affidavit and wiretap order were signed on

May 2, 1978.

II. Motions for Severance and Mistrial

Lopez argues the evidence demonstrated the existence of multiple conspiracies, rather than a single conspiracy, and therefore the trial court should have granted him a severance because of the prejudicial variance between the indictment and the proof. In conspiracy cases, "the existence of a unitary scheme matching that charged in the indictment is a question for the jury." United States v. Lutz, 621 F.2d 940, 943 (9th Cir.), cert. denied sub nom. White v. United States, 101 S.Ct. 160 (1980). Viewing the evidence in the light most favorable to the government, we find the evidence was sufficient to create a jury question on the existence of a single conspiracy. United States v. Thomas, 586 F.2d 123, 132 (9th Cir. 1978). See also United States v. Kenny, No. 79-1544 (9th Cir. decided Jan. 23, 1981).

Lopez and Hoffman also claim the trial court should have severed their trials because there was more evidence introduced against other defendants. Generally co-defendants jointly charged are to be jointly tried and a motion for severance is addressed to the discretion of the trial court. United States v. Gay, 567 F.2d 916 (9th Cir.), cert. denied, 435 U.S. 999 (1978). See also United States v. Kenny, No. 79-1544 slip op. at 57-58 (9th Cir. decided Jan. 23, 1981). There was no abuse of discretion.

Hoffman claims further error in the trial judge's refusal to grant him a severance because other co-defendants would testify for him if he were tried separately. The evidence against Hoffman revealed his association as a supplier with two of the leading members of the conspiracy, Leonard Enriquez and John Lange. The defendants Hoffman

indicated would exculpate him were Ramirez, Glotfelter and Lopez who would testify, in essence, that they did not know Hoffman. The government did not have to prove Hoffman knew every member of the conspiracy and it did not try. This testimony would have no exculpatory significance. See United States v. Vigil, 561 F.2d 1316, 1317 (9th Cir. 1977). Since Hoffman fails to demonstrate any prejudice or unusual circumstances which would compel the trial court to exercise its discretion to sever, there was no abuse of discretion. See United States v. Ellsworth, 481 F.2d 864, 870 (9th Cir. 1973), cert. denied, 414 U.S. 1041 (1974).

Appellant Lopez argues Leonard Enriquez' brief outburst and removal from the courtroom were grounds for a mistrial. The trial court promptly instructed the jury to disregard Enriquez' outburst and any statements made with respect to the episode and admonished the jury to decide the case only upon the evidence presented. On balance we cannot hold that there was abuse of discretion in the refusal to grant a mistrial. See United States v. Gardner, 611 F.2d 770, 776-77 (9th Cir. 1980); United States v. Clardy, 540 F.2d 439, 444-45 (9th Cir.), cert. denied sub nom. Tucker v. United States, 429 U.S. 963 (1976). See also United States v. Marshall, 458 F.2d 446, 451 (2d Cir. 1972).

III. Membership in the Conspiracy

Virginia Ramirez and Adrian Lopez challenge the sufficiency of the evidence to support their conspiracy convictions. On appeal, this Court must view the evidence in the light most favorable to the prosecution and determine whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." United States v. Kenny, No. 79-1544 slip op. at 46 (9th Cir. decided Jan. 23, 1981); United States v. Bailey, 607 F.2d

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237, 243 (9th Cir. 1979), cert. denied sub nom. Whitney v. United States, 445 U.S. 934 (1980). The telephone calls in which the defendant Ramirez participated constituted the government's direct proof of her participation in the conspiracy. Other co-conspirators' statements also indicated her participation. The calls in which Lopez participated comprised discussions regarding obtaining, cutting, loaning and selling large quantities of heroin. There was, then, sufficient evidence for a trier of fact to conclude Ramirez and Lopez knew they were plotting in concert with others to violate the law. See United States v. Thomas, 586 F.2d 123, 132 (9th Cir. 1978); United States v. Kearney, 560 F.2d 1358, 1362 (9th Cir.), cert. denied, 434 U.S. 971 (1977).

IV. Ineffective Assistance of Counsel

Appellant Hoffman argues that cumulative errors established the incompetency of his defense counsel and prejudiced his defense. Several of the claimed errors rest upon factual allegations outside the trial court record, however, and Hoffman has an adequate remedy provided by 28 U.S.C. § 2255. United States v. Lara-Hernandez, 588 F.2d 272, 275 (9th Cir. 1978).

V. Misconduct by the Trial Court

Appellants Hoffman and Lopez allege the trial court improperly limited cross-examination of government witnesses and overstepped the bounds of neutrality and impartiality by making objections, assisting in questioning and rehabilitating witnesses, and failing to maintain composure. The proper extent of cross-examination generally lies within the discretion of the trial court. United States v. Kizer, 569 F.2d 504 (9th Cir.), cert. denied, 435 U.S. 976 (1978). The record reveals the court primarily

limited cross-examination when the questions on cross exceeded the scope of direct examination. This did not constitute an abuse of discretion. See United States v. Bagsby, 489 F.2d 725, 727 (9th Cir. 1973). We find no merit to the other claims of judicial misconduct. A trial judge must, of course, constantly be aware of his sensitive role in a jury trial and avoid even the appearance of advocacy or partiality. We find the conduct complained of here was not at any single point or cumulatively so prejudicial as to deprive the defendants of a fair trial. See United States v. Eldred, 588 F.2d 746 (9th Cir. 1978).

VI. Prosecutor Misconduct

Appellants Johnson and Leonard Enriquez plead the prosecutor committed misconduct in his closing argument to the jury by attacking defense counsel, vouching for witness credibility, and commenting on defendant Enriquez' failure to testify. Appellants' arguments about attacks upon defense counsel are without merit. Any comment relating to Leonard Enriquez' failure to testify was an indirect and inadvertent remark which was quickly corrected. See United States v. Tierney, 424 F.2d 643, 647 (9th Cir.), cert. denied, 400 U.S. 850, 91 S.Ct. 53 (1970). As to the allegations that the prosecutor vouched for government witnesses' credibility, we agree prosecutors should refrain from implying that the government has taken steps to assure the veracity of its witnesses. United States v. Roberts, 618 F.2d 530, 533 (9th Cir. 1980). In this case, however, defendants' allegations must be rejected when viewed in the context of defense counsel's closing arguments that the government witnesses were liars. United States v. Potter, 616 F.2d 384, 392-93 (9th Cir. 1979), cert. denied, 101 S.Ct. 101 (1980). The trial judge admonished the jury that

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statements and arguments of counsel were not evidence.

VII. Logbooks Into the Jury Room

During the jury deliberations, a logbook which was not admitted into evidence was inadvertently allowed into the jury room. The jurors made some use of the logbook, as evidenced by their request to rehear several telephone conversations by date and number. When the error was discovered, the trial court conducted a short inquiry to determine the severity of the breach by asking the jury foreman specifically and the r st of the jury collectively to what extent they saw or discussed the information in the inadmissible logbooks. United States v. Vasquez, 597 F.2d 192, 194 (9th Cir. 1979). In light of the short time the logbook (only a part of a mass of evidence) was present in the jury room and the foreman's assertion and jury's agreement that only the dates of phone calls were looked up in the logbook, we agree with the district court's conclusion that the error, if any, was harmless. Had defense counsel wished a more extensive questioning of the jury, counsel should have requested a more extensive inquiry before the verdicts were returned.

VIII. Punishment for Exercising Right to Trial

Appellants allege they were punished for exercising their sixth amendment right to a jury trial because the sentences imposed upon them were disproportionate to the sentences imposed upon other co-defendants who pled guilty, without an adequate explanation in the record for the sentencing disparity. Most of the defendants who chose to forego trial entered guilty pleas to lesser charges. One defendant, Arnold Enriquez, who pled guilty to the actual conspiracy charge (Count 1) and a facilitation charge, received a sentence and fine comparable to the sentences and

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fines imposed upon the defendants who were convicted of the conspiracy charge (Count 1) and numerous facilitation charges. There is no substantial disparity in the sentencing and the appellants' contention is without merit.

Appellant Hoffman further submits that his sentence is excessive. The district court has wide discretion in determining what sentence to impose and, as long as the sentence is within statutory limits, it will not be reviewed on appeal. United States v. Wylie, 625 F.2d 1371, 1379 (9th Cir. 1980).

IX. Other Contentions

Defendants Hoffman and Alfred Enriquez allege it was error to allow one of the DEA agents to identify the defendants' voices because he had never heard their voices in person or on voice exemplars. Defendant Alfred Enriquez contends further that the government failed to show he was the same Alfred Enriquez named in the indictment. As to the identity of the speakers in the telephone conversations, there was sufficient circumstantial evidence for the jury to determine that they were, indeed, defendants' voices. The trial court did not abuse its discretion in admitting this testimony. Carbo v. United States, 314 F.2d 718, 743 (9th Cir. 1963), cert. denied sub nom. Palermo v. United States, 377 U.S. 953 (1964). Similarly, a prima facie case regarding the identity of Alfred Enriquez was made so the jury could conclude the person named in the indictment and the defendant were one and the same.

The trial court's refusal to admit the DEA (6) report was not error. In the trial court, defendant Hoffman's attorney attempted to have the report admitted into evidence under several theories, all of which were properly rejected by the trial court. On appeal, Hoffman

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alleges additional theories for admission under the evidence rules. There is no plain error which would warrant reversal in this case. See United States v. Sims, 617 F.2d 1371 (9th Cir. 1980); United States v. Lara-Hernandez, 588 F.2d 272 (9th Cir. 1978).

Appellant Leonard Enriquez provides no basis for his contention that 21 U.S.C. § 843(b) is an implicit exception to the definition of a continuing criminal enterprise in 21 U.S.C. § 848(b). His contentions that the sentence imposed upon him was improper because the trial court specified parole eligibility which is not allowed for a conviction of 21 U.S.C. § 848 will not be entertained on appeal. That matter is more properly presented to the district court by a rule 35 motion to correct an illegal sentence.

Finally, Enriquez' conviction on Count 29 (21 U.S.C. § 843(b)) must be upheld. His conviction on Count 1 (21 U.S.C. § 846) established his membership in the conspiracy. Gary Parra's acquittal on Count 29 resulted from insufficient evidence, which tended to show only that Parra was a mere customer or involved in another drug conspiracy not charged in the indictment. See United States v. Martin, 599 F.2d 880 (9th Cir.), cert. denied sum nom. Andrews v. United States, 441 U.S. 962 (1979). That provides no basis for Enriquez' acquittal on the facilitation charge; his participation in the conspiracy and knowing use of the telephone to facilitate that conspiracy is punishable under 21 U.S.C. § 843(b). United States v. Turner, 528 F.2d 143, 165 (9th Cir.), cert. denied sub nom. Hackett v. United States, 429 U.S. 837 (1976). See also United States v. Pierorazio, 578 F.2d 48 (3d Cir.), cert. denied, 439 U.S. 981 (1978).

Affirmed.

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2-5-73—1734—903

FILED

MAY 4 1981

RICHARD H. DEANE
CLERK, U.S. COURT OF APPEALS

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. LEONARD DURAN ENRIQUEZ, ET AL., Defendants-Appellants.	Nos. 79-1714-79-1719 & 79-1722 ORDER AMENDING MEMORANDUM AND DENYING PETITIONS FOR REHEARING

Before: GOODWIN and SCHROEDER, Circuit Judges and JAMESON*, District Court Judge

Upon due consideration, the panel orders that its memorandum decision be corrected to read as follows:

Substitute "cocaine" for "heroin" on page 5, line 1, of the printed memorandum.

The panel as constituted in the above case has also voted to deny the petitions for rehearing.

*Honorable William J. Jameson, Senior United States District Judge for the District of Montana, sitting by designation.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

UNITED STATES OF AMERICA, Plaintiff, vs. LEONARD DURAN ENRIQUEZ, et al., Defendants.	)	No. CR 78-287 PHX - CAM
	)	ORDER

Defendants object to the Government's intent to use a composite tape recording (Government's Exhibit 43) made from the "duplicate original" tape recordings (which were not sealed pursuant to court order as were the "original" tape recordings) and move to suppress admission of all telephone conversations intercepted in relation to this case, and to dismiss the indictment, because of the Drug Enforcement Administration's use of administrative subpoenas to obtain documents [Government's Exhibits 135(a) and 135(b)] from the telephone company prior to the entry of the Court's orders permitting wiretaps, which orders were issued pursuant to 18 U.S.C. §§ 2510 et seq. The documents in question contain "cable and pair" information which is necessary to institute the types of wiretaps used in this case. The Court has heard the testimony of DEA Agents Rabourn and Garia at the hearing on these issues and a trial, and has heard oral argument and received memoranda from all parties.

Based on testimony and the stipulation of the parties related to the issues decided herein, and argument of counsel, the Court finds as follows:

(1) The Drug Enforcement Administration obtained the documents in question pursuant to subpoenas (Government's Exhibits 1 and 2 for purposes of this hearing) issued by the DEA.

(2) There is no evidence that federal agents intercepted wire or oral communications (as defined by 18 U.S.C. §§ 2510 et seq.) prior to issuance of the Court's orders in this matter.

(3) The DEA had need to obtain such information prior to obtaining the Court's orders in order to ascertain the procedure to use in setting up the equipment for the hookup to the telephones to be tapped. Agent Rabourn has testified, without contradiction, that he visited the sites of the cable outlets to see where the DEA could set up surveillance posts and to see what equipment would be necessary to actually tap the telephones in question, but that he did not touch any cable outlets or intercept any communication or show any intent to do so prior to issuance of Court order permitting such interception.

(4) The telephone company records were not public records but were business records within the meaning of the Federal Rules of Evidence.

(5) There has been no showing that the subpoenas in question were issued in a manner contrary to law.

(6) The fact that the telephone company has no need for cable and pair information except for maintainance purposes (as indicated by the parties' stipulation) is not dispositive of whether the Drug Enforcement Administration should have had access to the information as reflected by DEA

Special Agent Rabourn's testimony during trial that he went to the "appearance" locations in order to see what might need to be done to facilitate the wiretaps. In addition, cable and pair information is necessary to installation of a pen register, which installation would not violate the dictates of 18 U.S.C. § 2510 et seq.

(7) The DEA agents participating in this case at all times maintained proper custody and control of the original tape recordings in accordance with the orders of the Honorable Wm. P. Copple, U.S. District Judge, District of Arizona, and of the duplicate original tape recordings from which the composite tape (Government's Exhibit 43) was made. The DEA agent in charge of making the composite, which is offered in evidence at trial, was competent and knowledgeable to the extent necessary to make such composite tape recording. The chain of custody established by the agents who testified established that no alterations or deletions were made to the original, duplicate original, or composite tapes.

(8) DEA Special Agent Rabourn took no notes other than those contained on Government's Exhibits 135(a) and 135(b), and in addition, first saw the cable and pair binding posts and exposed wires after entry of the court order authorizing wire interception.

For purposes of these motions, the court will assume that all defendants (as has been the procedure throughout this trial) have joined in these motions and that all claims are based, jointly and in the alternative, on the First and Fourth Amendments; 18 U.S.C. §§ 2510, et seq., and particularly §2515; and 47 U.S.C. § 605. Based on the foregoing and the Court's findings of fact, the Court concludes as follows:

. . . . . .

(1) The Drug Enforcement Administration is authorized by law to issue subpoenas such as those issued in the instant case, including Government's Exhibits 1 and 2, for the purposes of this hearing. 21 U.S.C. §§ 876, 965; 28 C.F.R. §§ .100 and .104(3)(a).

(2) There is no legal distinction between the records sought and obtained in this matter and the toll records obtained, U.S. v. Baxter, et al., 492 F.2d 150, 165-67 (9th Cir. 1973), cert. denied 94 S.Ct. 1945 (1974); and U.S. v. Fithian, 452 F.2d 505, 506 (9th Cir. 1971) despite the fact that the records obtained in this instance [Government's Exhibits 135(a) and 135(b)] contained "cable and pair" information.

(3) The Fourth Amendment does not preclude the obtaining of Government's Exhibits 135(a) and 135(b) for the reason that the right of privacy that is the basis for defendants' argument attaches to the telephone conversations themselves and not to the information related to the telephone company records. See U.S. v. Fithian, supra; U.S. v. Baxter, et al., 492 F.2d 150, 165-167 (9th Cir. 1973), cert. dismissed 94 S.Ct. 16, rehearing denied (1973), cert. denied 94 S.Ct. 1945 (1974).

(4) Obtaining Exhibits 135(a) and 135(b) prior to obtaining court orders did not violate the provisions of 18 U.S.C. §§ 2510, et seq., and particularly § 2515. 18 U.S.C. § 2515 proscribes the use, as evidence of the contents of intercepted wire or oral communications. 18 U.S.C. § 2510(4) defines "Intercept" as meaning "the aural acquisition of the contents of any wire or oral communication through the use of any electronic, mechanical, or other device.", or the attempted aural acquisition of such contents by such means. U.S. v. McIntyre, 582 F.2d 1221 (1978).

There was no attempted interception prior to entry of the Court's order in this case.

With respect to the acquisition of Government's Exhibits 135(a) and 135(b), Defendant Lopez's motion, in which all other defendants have joined, must fail for two reasons:

(a) First, the evidence was not acquired "aurally" as required by § 2510(4). To acquire "aurally" means to acquire by hearing. Webster's Third New International Dictionary at 144. As previously noted, the exhibits were documents given over to the DEA agent by an employee of the telephone company.

(b) Second, the documents [Exhibits 135(a) and 135(b)] were not acquired through the use of any electronic, mechanical, or other device within the meaning of the Statute.

(5) The Government's actions in obtaining Government Exhibits 135(a) and 135(b) do not violate the provisions of 47 U.S.C. § 605. See U.S. v. Baxter, supra.

(6) White v. Weiss, 535 F.2d 1067 (8th Cir. 1976), is not dispositive of this case. In White, a wire interception was accomplished illegally. On the facts before the Court at this time, defendants base their motions solely on the Government's actions in getting cable and pair information from the telephone company by subpoena prior to obtaining a court order to institute the wiretap. No conversations were intercepted prior to the entry of the Court's order in the case before the Court at this time.

(7) In re Application of the United States, 427 F.2d 639 (9th Cir. 1970) stands for the proposition that prior to enactment of 18 U.S.C. § 2518(4), the United States

could not force the telephone company to cooperate in instituting wiretaps. The case does not stand for the proposition that the telephone companies could not cooperate if they chose to do so. The fact that § 2518(4) requires the telephone company to provide court ordered assistance does not mutually exclude the possibility of the telephone company assisting the Government voluntarily. The only difference is that if the telephone company assists the Government without benefit of a court order, it runs the risk of being civilly or criminally liable for its actions in the event that it aids and abets an unlawful wiretap.

(8) The Court finds that the Government's Memorandum of Proof of Foundation to Support Admissibility of Tape Recordings from Electronic Surveillance filed with the Court on June 19, 1979, is well taken and hereby adopts and incorporates such memorandum into this order, together with other statements made by counsel and testimony of witnesses from the record of the trial and hearings in this matter. In any event, the broader requirements of U.S. v. Scully, 546 F.2d 255 (9th Cir. 1976) have certainly been met in this case and the prima facie foundation requirements of Carbo v. U.S., 314 F.2d 718, 743 (9th Cir. 1963), cert. denied, 377 U.S. 953 (1964) have also been met.

(9) Counsel have also objected to the admission of the recordings that have been intercepted in this case on the grounds that the originals of these recordings which have been under court seal were not used in the preparation of the composite recordings which the Government wishes to present to the jury as an exhibit. They cite Title 18, § 2518(8)(a) in support of their view which in pertinent part reads as follows:

.....

The presence of the seal provided for by this subsection, or a satisfactory explanation for the absence thereof, shall be a prerequisite for the use or disclosure of the contents of any wire or oral communication or evidence derived therefrom under subsection (3) of section 2517.

The Court finds that Plaintiff United States Government has given a satisfactory explanation for the absence of the use of the original recordings that are still under court seal by stating that they wish to preserve the integrity of these tapes by maintaining them under seal so that they may at any point that the original duplicates are challenged be compared with the originals still under seal and the Court finds this to be a satisfactory explanation. In any event, the Court finds that if there is error in the Government's use of the duplicate originals that it is harmless error since the originals under seal are available to counsel for any appropriate purpose they wish to make of them pursuant to court order for comparison purposes. In addition, the Court does not wish at this time to delay the trial for an excessive period of time which might be required if the Government were ordered to make a new composite tape exhibit from the original tapes under seal.

(10) Finally, it appears to the Court that in light of the extensive cooperation afforded defense counsel by the United States Attorney, the motion made with respect to making of the composite tape from the original tapes could have been brought before trial as required by 18 U.S.C. § 2518 (10)(a).

Therefore,

IT IS ORDERED that defendants' motions to suppress and motions to dismiss based on the Government's means of

obtaining exhib its 135(a) and 135(b) are denied, and objections to the admissibility of Government's Exhibit 43 is overruled.

DATED this 20th day of June, 1979, at Phoenix, Arizona.

C. A. Muecke
United States District Judge

MICHAEL D. HAWKINS
U. S. Attorney
District of Arizona
5000 Federal Building
Phoenix, Arizona 85025

DANIEL R. DRAKE
Assistant U. S. Attorney

BILLIE A. ROSEN
Assistant U. S. Attorney

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

UNITED STATES OF AMERICA, Plaintiff, vs. LEONARD DURAN ENRIQUEZ, et al, Defendants.	NO. CR-78-287-PHX-CAM MEMORANDUM OF PROOF OF FOUNDATION TO SUPPORT ADMISSIBILITY OF TAPE RECORDINGS FROM ELECTRONIC SURVEILLANCE

This memorandum is intended as a supplement to the Government's Trial Memorandum filed in this case to summarize for the Court the proof which has been introduced to this point demonstrating sufficient foundational evidence for admission of the tape recordings.

Initially, most Courts required very specific prerequisites to establish admissibility. These criteria were defined as: (1) a showing that the mechanical transcription device was capable of taking testimony; (2) that the operator was competent to operate the device; (3) a showing that the recordings are authentic and correct; (4) a showing that there were no changes, additions, or deletions; (5) a showing as to the manner of preservation of the recordings; (6) the speakers must be identified; and (7) it must be shown that the testimony was freely and voluntarily made without any kind of duress. See United States v. McMillan, 508 F2d 101, 104 (8th Cir. 1974), cert. denied, 421 U.S. 916 (1974); United States v. McKeever, 169 F. Supp 426, 430

(S.D.N.Y. 1958)

In United States v. Scully, 546 F2d 255 (9th Cir. 1976) the Ninth Circuit approved a more general procedure. The Court declared:

> "Authentication in General. At trial there was extensive testimony on the elaborate procedures used to record the conversations on four simultaneously operating tape recorders. One set of tapes was removed from the machine, sealed, stored in a foot locker under lock, and turned over to Judge Williams, where it was sealed again. The monitoring agents kept logs on each telephone call. At trial, 10 of the 16 monitoring agents testified as to the procedures they followed. There was not, however, any testimony by the agents as to each of the 396 conversations admitted into evidence that a particular agent had listened to the call and that the tape accurately reproduced the conversation. Thus, the tapes were generally, but not specifically, authenticated.
>
> "Such a procedure appears proper. A prima facie case that the tapes were what the government said they were was made out by the proof adduced on the procedures followed. On review, this Court is limited to correction of abuse of judicial discretion by the trial court in finding a prima facie case that the evidence is what the proponent says it is and turning the issue over to the jury for the final determination. Carbo v United States, 314 F.2d 718, 743 (9th Cir. 1963), cert. denied, 377 U.S. 953, 84 S.Ct. 1625, 12 L.Ed.2d 498 (1964). There is no apparent abuse here. Cf. Fed.R.Evid. 901(a)."

A review of the evidence presented to date in this trial demonstrates that the Government has not only satisfied the

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elements set forth in Scully but even the more stringent foundational criteria in McMillan, et al:

1. Mechanical Transcription Device was Capable of Taking Testimony

The Government has shown this element by the following testimony:

a. The testimony of SA Cliff Rabown that he tested the equipment prior to the commencement of any interception and it was operational and correctly recorded what he said.

b. The testimony of the monitors that both the original and duplicate original were tested during the changing of the tapes to be sure the conversations had been recorded on the tapes, and, with the exception of one duplicate original tape, all conversations were recorded on both the original and duplicate original.

c. The testimony of the monitors that they listened to all of the conversations that they monitored, and that each tape recording is an accurate reproduction of what he heard during the actual conversation whilemonitoring it at the listening post.

2. The Operator was Competent to Operate the Device

The Government has demonstrated this element by the following evidence:

a. The testimony of SA Joseph Parra that he instructed the monitoring agents on how to use the equipment prior to the commencement of the wiretap.

b. The testimony of the monitoring agents that they received instruction on using the equipment.

c. The testimony that the recording equipment were commercially available Sony recorders and the testimony by all of the monitoring agents that they operated all of the recording equipment by one on-off switch on the central power source.

d. The only testimony elicited that any of the monitoring agents had any difficulty whatsoever in operating the equipment concerned instances where the pen register, not the recording machines, were manually activated before the pen register had sufficient time to complete the electrical process of ascertaining the date, time and telephone number in outgoing calls when a call was minimized.

3. The Records are Authentic and Correct

This element of foundation is, in actuality, a summary of the first two and the next two elements combined. In addition, the following evidence also establishes the authenticity and correctness of the recordings:

a. The testimony of Mr. Ronald Newman and Ms. Carolyn Newman establishing the cable and pair data and other identifying information on telephone number 602-849-6853 and number 602-956-9675.

b. The testimony of Mr. David Burkhart that he gave this same identifying data, each unique to the respective number, to an agent of the Drug Enforcement Administration pursuant to the Court orders.

c. The testimony of SA Cliff Rabown and Daniel Bax that they utilized this information (cable and pair numbers, etc.) to hook up the pairs for numbers 602-849-6853 and 602-956-9675 to the Government lease lines which in turn were connected to the monitoring equipment.

d. The testimony of SA's Joseph Parra, Cliff Rabown, Daniel Bax and Laura Garcia as to the test calls made prior to the commencement of each electronic interception, each test call being successful.

e. The telephone tolls, which thus far are either just identified or in evidence for a limited purpose, will be shown to reflect outgoing calls from the target numbers to long distance or

toll numbers matching those intercepted; likewise, incoming calls from long distance and toll numbers whose tolls are available will demonstrate that the target telephone was the number called.

4. No Changes, Additions, and Deletions Were Made

This element was shown by the testimony of the monitoring agents that they at no time made any changes, additions or deletions in the parts of the tapes being played as evidence. The only deletions in the calls being played are the last parts of two conversations where one party returned to speaking to a third party who was on call waiting while the first party completed his conversation with the second party; these latter segments were actually recorded, but the Government has chosen not to utilize that part of the conversation as evidence in its case-in-chief. Additionally, everyone in the chain of custody has testified that, while the tapes were in their possession, they at no time changed, added or deleted anything on the tapes themselves.

5. The Manner of Preservation Must Be Shown

The Government has shown this element by the following testimony:

a. The monitoring agents testified that they changed the tapes on all three recorders at the end of each shift (there were three shifts per day). All of the tapes were sealed in boxes which were themselves sealed in heat-sealed envelopes and deposited in a mail-drop box. Only SA Laura Garcia had a key to this mail box.

b. SA Laura Garcia testified that she maintained custody of the original tapes until they were sealed with the Court after each interception was completed; and that she maintained custody of the duplicate originals at all times except (1) when checked out to the various transcribing agents, who returned them after completing transcription; and (2) when she gave them to SA

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Dennis Checkoway on about June 4, 1979, so that he could make the "master" tapes, containing only the calls the Government intends to use at trial.

c. The transcribing agents testified as to the time of their custody of the duplicate originals.

d. SA Dennis Checkoway testified that he received custody of all of the duplicate originals on or about June 4, 1979, and has maintained custody since that time. He further testified to the procedures that he used to make the "master" tapes from the duplicate originals.

e. All of the above persons testified that at no time did they make any changes, additions or deletions in any of the tapes.

6. The Speakers Must Be Identified

This element must be particularly shown prior to the playing of each conversation. The Government intends to prove the speakers' identities by various means including:

a. Testimony of law enforcement officers that they heard the speaker's voice on other occasions, for example, in conversations or tapes where the speaker identified himself or was identified by the second party to the call, or when the agent had personal conversation with the speaker.

b. Testimony of telephone company subscriber records.

c. Self-identification by the speaker or by the other party to the call.

d. Surveillance by law enforcement officers, airline and motel records, and other circumstantial evidence corroborating the planned activities of the speaker or a co-defendant.

7. The Testimony Was Freely and Voluntarily Made Without Duress

As the foundation testimony will be shown by the enforcement officers, certified-exemplified records, and custodian

of-record witnesses, this element is satisfied.

Respectfully submitted this 18th day of June, 1979.

MICHAEL D. HAWKINS
United States Attorney
District of Arizona

Billie A. Rosen

BILLIE A. ROSEN
Assistant U. S. Attorney

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U.S. ATTORNEY
PHOENIX

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(315)

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

LEONARD ENRIQUEZ, et al.,

Defendants.

No. CR 78-287 PHX - CAM

ORDER

The Court received motions to suppress the fruits of three wiretaps conducted during the investigation which culminated in the indictment which is the subject of the above numbered and entitled case, and the Government's response thereto. The motions in question were filed by Defendants Jacob Lange, Garry Parra, and Leonard Enriquez, and were joined in by Defendants John Johnson, Virginia Ramirez, Hal Glotfelter, Murillo, Lopez, and Alfred O. Enriquez. All written motions, joinders, responses, and replies were filed between the dates of January 11, 1979, and February 6, 1979.

On February 5 and 6, 1979, the Court held hearings at which the parties argued their motions. The Court made findings of fact, conclusions of law, and rulings during the course of the hearing which are hereby incorporated in this order. The Court further finds the facts and law to be as set forth below.

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Statement of the Case

In September 1977, the Drug Enforcement Administration began an investigation into the activities of what shall be called, for the purposes of this order, the "Enriquez Organization" (six of the twenty-two persons charged in the indictment bear the name "Enriquez", including the two persons alleged to be the principals in the organization).

On February 17, 1978, DEA Special Agent Laura Garcia submitted an affidavit to the Court in support of a request to have a pen register installed on the telephone of Arnold Enriquez. Subsequent affidavits were submitted on March 21 and April 13, 1978, in support of requests for wiretaps on the same telephone, all pursuant to 18 U.S.C. §§ 2510, et seq. On May 2, 1978, Agent Garcia submitted a fourth affidavit to the Court in support of application number 1081 for a wiretap on the telephone registered to Virginia Ramirez, which was located in the home shared by Leonard Enriquez and Virginia Ramirez. At the time the affidavits were submitted, the Court found them to be sufficient to support a finding of probable cause to warrant authorization of a wiretap and entered its order accordingly.

Defendants challenged the sufficiency of the affidavits by timely filed motions to suppress and argued the motions at hearings held for that purpose in October and November 1978. The motions that are the subject of this order were initially filed outside the time limits set by the Court for the filing of pretrial motions and without permission of the Court. For that reason, the Court denied the motions, for failure of timely filing, at the hearing held in this matter on February 5 and 6, 1979.

Based on defense counsels' allegations that United States v. Santora, 583 F.2d 453 (9th Cir. 1978), shed new

light on this matter and that the case was not published at the time of the previous hearings in this matter, the Court granted leave to file motions to suppress to those defendants who were affected by the third and final wiretap executed in this case, i.e., order No. 1081, the wiretap on the phone registered to Virginia Ramirez and located in the home shared by Ms. Ramirez and Leonard Enriquez. Thus the defendants have had ample time within which to prepare for the hearings on these motions.

Law of the Case

Defendants seek to have the fruits of the third wiretap suppressed on the grounds that Agent Garcia's affidavit in support of the wiretap contained materially false and misleading information which information Ms. Garcia included in the affidavit knowingly and intentionally, or with reckless disregard for the truth, and which allegedly false information is necessary to a finding of probable cause. The defendants also challenge the affidavit as insufficient on its face in light of the Santora, supra, decision.

The first issue that must be addressed, therefore, is whether the affidavit is insufficient on its face. At the outset, it should be noted that the affidavits submitted in support of the wiretaps were reviewed by the Honorable William P. Copple, United States District Judge, District of Arizona, who found the affidavits sufficient to justify issuance of an order authorizing the wiretaps. Absent the complicated nature of this case and the rapid development of law with respect to wiretaps [i.e., Franks v. Delaware, 98 S.Ct. 2674, decided June 26, 1978, subsequent to the authorization of the wiretaps; Scott v. United States, 98 S.Ct. 1717, decided May 15, 1978, also subsequent to the authorization of

the wiretaps; United States v. Baker, No. 78-1883, Ninth Circuit, January 18, 1979; United States v. Santora, 583 F.2d 453 (9th Cir. Oct. 1978)], this Court would not review another district judge's determination of the probable cause basis for the wiretaps. See In re Persico, 362 F.Supp. 713 (D.N.Y. 1973). We do so now only for the purpose of clarifying the record in this matter.

The final affidavit of Agent Garcia, offered in support of the third wiretap recited the following allegations and facts: (1) due consideration of the possibilities of infiltration [May 2, 1978, affidavit at ¶15]; this allegation is supported by the factual showing regarding Leonard Enriquez's brother, Arnold Enriquez, and the failure of Agent Garcia to infiltrate his organization in September 1977 [March 21, 1978, affidavit (1st wiretap) at ¶¶20-26 & 35]; and the failure of an earlier attempt to infiltrate the organization, Id. at ¶52, and because of the large number of persons involved [May 2 affidavit at ¶¶3, 4; April 13 affidavit at ¶10]. (2) The infeasibility of locating records of narcotics transactions; this allegation is supported by Agent Garcia's statement that in her experience narcotics dealers do not keep records of their transactions and that seizure of such records alone, if they existed, would be insufficient to sustain a conviction [March 21 affidavit at ¶50]. Since affidavits in support of search warrants (or wiretap authorizations) are to be read in a common sense and realistic fashion, United States v. Ventresca, 380 U.S. 102, 108, 85 S.Ct. 741, 746 (1965), it is not unreasonable to conclude that use of such a search warrant to locate records would be an all or nothing attempt to seek evidence against the conspiracy when there was no hard evidence from which to conclude that the necessary records even existed. (3) the reluctance of informants to testify in

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court; this allegation is supported by the factual showing by Agent Garcia in her affidavits [May 2 affidavit at ¶12, April 13 affidavit at ¶9, and the March 21 affidavit at ¶¶16, 17, and 45]. In addition, the informants, whose credibility is amply supported by the affidavits, also stated to Agent Garcia that they feared for their lives, CI #1, stating, among other things, that he had seen Arnold Enriquez and some of his associates in possession of firearms. In addition, James Belkonen, who was a co-defendant with Leonard Enriquez in a 1974 drug case and who had offered to testify against Leonard Enriquez, died of morphine poisoning shortly after he agreed to cooperate. Belkonen was not known to be a narcotics addict or user. It is Agent Garcia's opinion, based on these facts, that Belkonen was given a forced overdose to prevent him from testifying against Enriquez. Her opinion is based on her experience in drug law enforcement [March 21 affidavit at ¶17]. The facts related support the allegation that the informants would not testify out of fear for their lives and the proposition that the Enriquez organization was considered dangerous. (4) the probable unproductiveness of grand jury investigations [May 2 affidavit at ¶17]; this allegation is supported by the fact that the Enriquez organization had a reputation for violence (see preceding paragraph) and the opinion of Assistant United States Attorney Dan Drake, who concluded that a grand jury investigation was unlikely to be successful since (a) the only potential witnesses, other than the informants, were the persons under investigation, all of whom would be entitled to assert their rights under the Fifth Amendment against compulsory self-incrimination; (b) because of the family nature of the organization it is unlikely that anyone would testify; and (c) that if any of the members of the organization were called before a

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grand jury, the remaining members would find out about it and change their method of operation [March 21 affidavit at ¶49]. (5) the conducting of surveillance without success [May 2 affidavit at ¶14]; the May, April, and March affidavits are replete with factual examples of attempted surveillance which met with minimal, if any, success. The affidavits set forth numerous examples in which surveillance was detected by the suspects and evasive action taken, along with statements by the suspects that they were wary of surveillance.

It is true that Agent Garcia's affidavits do not recite any examples of attempted infiltration of the organization through Leonard Enriquez. However, they do recite examples of attempted surveillance of Leonard Enriquez [May 2 affidavit at ¶13-14].

It is the Court's conclusion that the allegations contained in the Garcia affidavits, and the facts which support them, fall squarely within the fact situation present in United States v. Baker, No. 78-1883 at 200 (9th Cir. 1/18/79). The affidavits taken as a whole adequately support the conclusion that the requirements of 18 U.S.C. § 2518(1)(c) have been fully complied with in this case, i.e., that normal investigative techniques were tried and failed, or why they reasonably appeared to be unlikely to succeed if tried, or why they were too dangerous.

The Court further concludes that as a matter of law the affidavits are sufficient on their face to support authorization of a wiretap in accordance with the mandates of 18 U.S.C. §§ 2510, et seq.

Having concluded that the affidavit in support of the third wiretap is sufficient on its face, the Court must turn to the question presented by defendants regarding the alleged knowing and intentional use of false information in

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the affidavits by Agent Garcia, or the use of said alleged false information in reckless disregard for the truth. The rule to be followed in this situation is best set out in Franks v. Delaware, supra, 98 S.Ct. at 2685:

> [7-9] In sum, and to repeat with some embellishment what we stated at the beginning of this opinion: There is, of course, a presumption of validity with respect to the affidavit of supporting the search warrant. To mandate an evidentiary hearing, the challenger's attack must be more than conclusory and must be supported by more than a mere desire to cross-examine. There must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof. They should point out specifically the portion of the warrant affidavit that is claimed to be false; and they should be accompanied by a statement of supporting reasons. Affidavits or sworn or otherwise reliable statements of witnesses should be furnished, or their absence satisfactorily explained. Allegations of negligence or innocent mistake are insufficient. The deliberate falsity or reckless disregard whose impeachment is permitted today is only that of the affiant, not of any nongovernmental informant. Finally, if these requirements are met, and if, when material that is the subject of the alleged falsity or reckless disregard is set to one side, there remains sufficient content in the warrant affidavit to support a finding of probable cause, no hearing is required. On the other hand, if

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the remaining content is insufficient, the defendant is entitled, under the Fourth Amendment, to his hearing. Whether he will prevail at that hearing is, of course, another issue.

The defendants have made the requisite allegations of deliberate falsehood, or of reckless disregard for the truth. In addition, they argue that mere allegations are enough to warrant an evidentiary hearing on the merits of those allegations, citing United States v. Young Buffalo, No. 78-1079 (9th Cir. 1/11/79). The Court declines to interpret Young Buffalo in this manner and refers defendants to the above quotation from Franks v. Delaware, as it did during the course of the hearing.

The defendants have pointed out in their motions those portions of Agent Garcia's affidavits which they feel are false. In support of their claims defendants have submitted the affidavits of Defendants Parra and Leonard Enriquez. In addition, defendants by their attorneys also made an oral offer of proof at the hearing held in this matter on February 6, 1979, at which time they also offered Defendant Leonard Enriquez's Exhibits A - F (DEA reports that were already a part of the record of the prior hearing on wiretap suppression motions). It is the Court's conclusion that the affidavits of Parra and Enriquez are insufficient to warrant an evidentiary hearing regarding Agent Garcia's affidavits; that an oral offer of proof made by an attorney with nothing more (the Court not having prevented any appropriate showing) is insufficient under Franks v. Delaware, supra, to warrant said evidentiary hearing; and that the offer of proof made by defendants is insufficient as presented to warrant said

evidentiary hearing.

A. The Supporting Affidavits of Enriquez and Parra.

It is the Court's conclusion that the affidavits submitted by Defendants Leonard Enriquez and Garry Parra are insufficient as a matter of law and do not sufficiently controvert the May 2, 1978, affidavit of Agent Garcia, nor do the affidavits of the said defendants establish that she knowingly and intentionally, or with reckless disregard for the truth, included material false or misleading information in her affidavit. Franks v. Delaware, supra, 98 S.Ct. at 2685.

Enriquez Affidavit

¶1. With respect to ¶1 of the Enriquez affidavit, Agent Garcia did not conceal the fact that the items purchased as amphetamines were, in reality, DL-Ephedrine, not a controlled substance. March 21, 1978, affidavit of Agent Garcia, ¶25. Thus, there was no attempt here to mislead the Court. The affidavit also relates that members of the conspiracy had been heard to discuss amphetamine transactions, and that Arnold Enriquez thought he was selling amphetamines and intended to sell amphetamines. Id. at ¶¶ 19-26. In addition, there are enough other undisputed factual allegations regarding other controlled substances such as heroin and cocaine to overcome any false or misleading statements regarding amphetamines, if in fact there are any.

¶2. With respect to ¶2 of the Enriquez affidavit, the fact that Leonard Enriquez may not have threatened anyone is not the issue. The issue is whether the informants and other persons feared for their lives, and whether sufficient facts existed to provide an adequate foundation for that fear. The affidavit does not dispute Arnold Enriquez's reputation, or that of the Enriquez organization, for violence, and in addition, nowhere in their motions do defendants allege nor have they otherwise shown that Agent Garcia was not telling

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the truth as she knew it with respect to her allegations regarding these reputations. This Court finds Agent Garcia's representations to be "truthful" as defined in Franks v. Delaware, 98 S.Ct. at 2681.

¶3. With respect to this paragraph of the Enriquez affidavit, again defendants do not allege that Agent Garcia was aware of the facts alleged by Defendant Enriquez. It may be that the facts are as stated by Defendant Enriquez, but there is no showing that Agent Garcia knew, or had reason to suspect, that such was the case.

¶4. Again, with respect to this paragraph of the Enriquez affidavit, there is no allegation that Agent Garcia knew, or should have known, that the facts were other than as related.

¶5. The allegations contained in ¶5 of the Enriquez affidavit do not refute the allegations contained in the Garcia affidavit to the effect that Leonard Enriquez and other members of the organization had eluded productive surveillance, whether knowingly or unknowingly. It also does not address the point that no amount of surveillance can detect a distant party to a telephone call.

¶6. Paragraph 6 of the Enriquez affidavit goes to the reliability of CI #3. ¶28 of the March 21, 1978, affidavit of Agent Garcia sets out the basis for reliability of CI #3. The Court finds that basis to be sufficient. United States v. Ventresca, 380 U.S. 102, 85 S.Ct. 741, 745-46 (1965). Defendants have made no showing that false or misleading information was knowingly or intentionally, or with reckless disregard for the truth, included in her affidavits with respect to this paragraph.

In sum, the Enriquez affidavit has not come up to the standard set forth in Franks v. Delaware, 98 S.Ct. at 2685.

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The defendants are not entitled to an evidentiary hearing based on the allegations contained in their motions when combined with the supporting affidavit of Leonard Enriquez.

Parra Affidavit

The Parra affidavit adds nothing to Defendant Parra's motion or to the motions of the other defendants. Mr. Parra does not allege that the DEA even knew of his existence before the third wiretap. Furthermore, there is no requirement that the Government exhaust all possible normal investigative techniques with respect to each and every ultimate defendant, United States v. Baker, supra; United States v. Spagnuolo, 549 F.2d 705, 710 (9th Cir. 1977), and defendant cites no authority, and this Court does not believe there is authority, for the proposition raised by Defendant Parra as a basis for the granting of his motion to supress that the granting of immunity is a "normal investigative technique." If this were the law, then each and every defendant could make the same claim, and there would then be no defendants to be charged or tried.

It is, therefore, the Court's conclusion that the affidavits submitted in support of the motions to suppress add nothing to the motions to suppress, and the affidavits, taken together with all the allegations made in the motions, fail to make a substantial preliminary showing that Agent Garcia knowingly and intentionally, or with reckless disregard for the truth, included false statements in her affidavits. Franks v. Delaware, supra, 98 S.Ct. at 2676-77.

B. Oral Offer of Proof and Supporting Exhibits.

It is the conclusion of this Court that oral offers of proof made by attorneys with nothing more are insufficient under Franks v. Delaware to warrant an evidentiary hearing for the purpose of challenging affidavits offered in support of

wiretap authorization requests, that where defendants claim there are inconsistencies in the record, they must point to those places in the voluminous record in which the inconsistencies may be found, counsel having had ample opportunity to do this, and that any absence of requisite affidavits or references to the record must be satisfactorily explained. Franks, supra, 98 S.Ct. at 2685.

During the hearing in this matter, defendants by their attorneys made an oral offer of proof in support of some of the allegations made in their motions to suppress. Initially, no exhibits, affidavits, testimony, or other evidence was offered, other than the above discussed affidavits in support of the oral offer of proof (all defendants affected by the third and final wiretap joined in the offer of proof and the motions). In addition, the defendants could, but did not, direct the Court to points in the record which would support their allegations even though the Court repeatedly asked them to do so. The Court even recessed to give the defendants time to support their allegations with specific references to the record or exhibits. Defendants submitted Defendant Enriquez's Exhibits A - F.

Having reviewed these exhibits and heard from defendants and the Government with respect to the exhibits and offer of proof, the Court finds that the exhibits do not support defendants' position.

Defendants argue that the exhibits show that surveillance was productive and a viable means of pursuing the investigation at the time the wiretap in question was initiated. The Court disagrees. It is the Court's finding that the exhibits support the Government's position that the surveillance was inconclusive and spotty at best. It did not appear from the exhibits offered that surveillance was a promising

investigative technique in this investigation.

The Court concludes that, had it been necessary to rule on the merits of the oral offer of proof, the offer of proof was insufficient as a matter of law to warrant an evidentiary hearing with respect to Agent Garcia's affidavit, and that the motions and supporting affidavits and offers of proof are conclusory evidence of a mere desire to cross-examine. Franks, supra, 98 S.Ct. at 2685.

Based on the foregoing findings of fact and conclusions of law, and the findings of fact and conclusions of law made at the hearing on this matter,

IT IS ORDERED that the defendants' motions to suppress are denied.

DATED this 15th day of February, 1979.

C. A. Muecke
United States District Judge

Copy of the foregoing mailed this 16th day of February, 1979, to:
U. S. Attorney, Asst. Daniel R. Drake
Dennis Skarecky
Joseph Chornenky
Robert Storrs
Larry L. Debus
Brice Buehler
Stephen Rempe
John Moran
Craig Mehrens
Thomas E. Haney

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SUPREME COURT, U.S.

No. 80-6709

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

LEONARD DURAN ENRIQUEZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

LAWRENCE G. WALLACE
Acting Solicitor General

D. LOWELL JENSEN
Assistant Attorney General

SARA CRISCITELLI
Attorney

Department of Justice
Washington, D. C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether a conviction for engaging in a continuing criminal enterprise may rest in part on a series of illegal telephone conversations evidencing continuing narcotics violations.

2. Whether the affidavits supporting the applications for electronic surveillance sufficiently particularized why normal investigative techniques would be inadequate.

3. Whether the court erred in denying petitioner an evidentiary hearing to challenge the truthfulness of the electronic surveillance affidavits.

4. Whether the government's subpoena of telephone records prior to seeking a warrant for electronic surveillance tainted the subsequent surveillance.

5. Whether the sealing procedures for the original recordings and the use of duplicate-original recordings were proper.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No. 80-6709

LEONARD DURAN ENRIQUEZ, PETITIONER

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-10) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 24, 1981. Petitions for rehearing were denied on May 4, 1981. The petition for a writ of certiorari was filed on May 21, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the District of Arizona, petitioner was convicted of conspiracy to distribute cocaine, in violation of 21 U.S.C. 846, engaging in a continuing criminal enterprise, in

violation of 21 U.S.C. 848, and 11 counts of using a telephone in furtherance of the narcotics conspiracy, in violation of 21 U.S.C. 843(b). He was sentenced to 30 years' imprisonment, to be followed by a lifetime special parole. He was also sentenced to a concurrent term of imprisonment totaling 33 years on the telephone counts and fined $25,000. 1/ The court of appeals affirmed.

1. On March 21, 1978, the district court ordered the interception for 20 days of telephone calls over a telephone listed to Arnold Enriquez, petitioner's older brother. A second order continuing the interception was entered on April 13, 1978. Overheard conversations indicated that Arnold Enriquez was obtaining cocaine from petitioner and petitioner's friend, Jacob Lange, and that petitioner's possible sources were an individual in Miami and another individual known only as "Oklahoma Bob." On May 2, 1978, the court authorized the interception of communications over petitioner's telephone in an effort to locate and identify these sources of cocaine.

2. The evidence at trial was primarily gained from these interceptions and related surveillance. 2/ Briefly, it showed the existence of a conspiracy to distribute

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1/ Petitioner was not sentenced on the conspiracy count, the court noting that it was a lesser included offense of the continuing criminal enterprise count (Judgment and Commitment Order).

2/ Pre-trial motions to suppress evidence obtained through the interceptions were denied. (Feb. 15, 1979 Order. A copy of this order has been lodged with the Clerk of this Court.)

cocaine that reached from Miami, Florida to Phoenix, Arizona and Las Vegas, Nevada. Co-defendant Barry Hoffman, a source of supply, sold cocaine on two occasions in late March and April 1978 to petitioner and Lange. They or an associate brought the narcotics to Phoenix or Las Vegas, where petitioner sold the drugs in large quantities to distributors. In May 1978, petitioner and Lange flew to Miami to purchase cocaine again. At that time they noticed that they were being followed, and decided not to continue with their plans. When they returned to Phoenix, however, a search warrant was executed upon their luggage, uncovering a large quantity of a substance known to be used to "cut" or dilute cocaine and approximately $77,000 in cash. Other warrants executed that night at petitioner's and Lange's residences uncovered, among other things, a strainer bearing traces of cocaine, as well as quaalude tablets and marijuana.

ARGUMENT

1. Petitioner contends (Pet. 12-18) that his repeated use of the telephone in violation of 21 U.S.C. 843 cannot support his conviction for engaging in a continuing criminal

enterprise, in violation of 21 U.S.C. 848. 3/ This claim lacks merit.

Count 3 of the indictment charged petitioner with violating 21 U.S.C. 848 by engaging in a continuing criminal enterprise "in that he violated Title 21, U.S.C., Sections 841(a)(1) & (b), 843(b), & 846, which violations were part of a continuing series of violations of such statutes * * *." The court instructed the jury at length on section

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3/ 21 U.S.C. 848 reads, in pertinent part (emphasis added):

(a)(1) Any person who engages in a continuing criminal enterprise shall be sentenced to a term of imprisonment which may not be less than 10 years and which may be up to life imprisonment, to a fine of not more than $100,000, and to the forfeiture prescribed in paragraph (2); except that if any person engages in such activity after one or more prior convictions of him under this section have become final, he shall be sentenced to a term of imprisonment which may not be less than 20 years and which may be up to life imprisonment, to a fine of not more than $200,000, and to the forfeiture prescribed in paragraph (2).

* * * * *

(b) For purposes of subsection (a) of this section, a person is engaged in a continuing criminal enterprise if --

(1) he violates any provision of this subchapter or subchapter II of this chapter the punishment for which is a felony, and

(2) such violation is a part of a continuing series of violations of this subchapter or subchapter II of this chapter --

(A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and

(B) from which such person obtains substantial income or resources.

848. 4/ The court noted that "five essential elements are required to be proved, beyond a reasonable doubt, in order to establish" an offense under 28 U.S.C. 848: first, that petitioner committed at least one of the charged substantive 21 U.S.C. 843 offenses; second, that such violation was part of a continuing series of federal narcotics violations; third, that petitioner undertook to commit such offenses in concert with five or more persons; fourth, that petitioner occupied an organizational or supervisory position over such persons; and fifth, that petitioner obtained substantial income or resources from the continuing series of violations (Tr. 42: 255-256). In sum, the jury was properly instructed to find that petitioner violated 21 U.S.C. 848 only if it first found that he was guilty of a predicate narcotics felony, and that such felony constituted part of a continuing pattern of narcotics activity.

Thus, petitioner's claim that he was convicted of a continuing criminal enterprise based solely on 11 discrete statutory violations is incorrect. Rather, the jury found that he unlawfully used the telephone and that the evidence as a whole showed a continuing series of narcotics offenses. Beyond comprising violations themselves, the proven telephone violations provided evidence of a continuing series of illegal activities including purchase,

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4/ The court also instructed the jury on the statute proscribing possession with intent to distribute, 21 U.S.C. 841, reading the statute and defining all terms (Tr. 42:241, 249-253).

distribution, and conspiracy offenses that violated the charged narcotics laws. 5/ For example, petitioner was overheard saying that he had "been doing it for 10 years," in a context obviously referring to the sale of narcotics (Call Exh. 218). Petitioner instructed an associate on how to conduct a cocaine transaction safely in another call (Call Exh. 251). In yet another conversation petitioner discussed cutting techniques with his brother (Call Exh. 231); he later spoke with him about selling a "whole bunch more cocaine" (Call Exh. 253). Petitioner discussed in another recorded telephone conversation the relative merits of yellow and white cocaine (Call Exh. 263), and petitioner and his brother also talked generally about profit margins, the manner of dealing, and costs of operating an illicit drug business (Call Exh. 305). Thus, the tapes of the telephone coversations themselves establish a continuing series of narcotics conspiracy and distribution violations. Petitioner's suggestion, therefore, that three related telephone calls could impermissibly subject the caller to mandatory 10 years' imprisonment (Pet. 13-16) has no application to the facts of this case. 6/

5/ To the extent that the instructions failed to point in particular to the narcotics activity underlying his telephone counts, petitioner explicitly requested that limitation (Tr. 38:142-143) and cannot now complain that his request was honored.

6/ It is axiomatic that a statute whose constitutionality might be questioned in marginal fact situations may not be challenged on that ground if it is clearly constitutional as applied. United States v. Powell, 423 U.S. 87, 93 (1975); United States v. Mazurie, 419 U.S. 544, 550 (1975); Broadrick v. Oklahoma, 413 U.S. 601, 608 (1973).

Petitioner also suggests (Pet. 17) that by relying on telephone calls the government failed to prove that he obtained substantial income from his continuing series of narcotics violations. However, the intercepted telephone calls, briefly noted above, revealed petitioner's purchase of large amounts of cocaine, which he would distribute through his network. The recordings also indicated the profits realized by petitioner's narcotics activity (Call Exh. 305, 223), and constituted evidence from which the jury could reasonably conclude that he derived substantial income from the illegal enterprise.

2. Petitioner claims (Pet. 21-36) that the affidavits supporting the applications for electronic surveillance failed to particularize how normal investigative techniques had failed or would be unsuccessful. To the contrary, as the courts below found (Pet. App. 2; Feb. 15, 1979 Order 4-6), the affidavits related in detail the shortcomings of normal investigative techniques in this case. In particular, they told of attempted undercover penetration (Pet. App. 22, 33-34, 38, 56), inconclusive surveillance (Pet. App. 34), informants who were unwilling to testify at trial (Pet. App. 19-20), and information revealed from toll records and pen registers (Pet. 26-28, 30-33, 73-74). 7/ In

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7/ Petitioner argues (Pet. 29) that because an undercover agent succeeded in purchasing narcotics from his brother and surveillance agents saw particular vehicles at his brother's house, those techniques were in fact successful. However, these "successes" were so limited and so unpromising of future progress that they compellingly demonstrated the limitations of (continued)

addition, the affidavits show federal agents considered and rejected face-to-face interrogation of suspects and a grand jury investigation because of the refusal of knowledgable persons to testify and the likelihood that these investigations would alert the targets prematurely (Pet. App. 35-39, 57, 76), especially because certain of the suspects had faced or were currently facing other criminal charges and thus had both the knowledge and the incentive to avoid detection (Pet. App. 25-26, 28-29, 34, 56, 75). Agents had utilized previously at least one search warrant without extensive success, and they believed other search warrants would also have limited results (Pet. App. 56). The affidavits thus set forth in great detail the reasons why electronic surveillance was necessary and proper in this particular case. 8/

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traditional techniques. United States v. Martinez, 588 F.2d 1227, 1232 (9th Cir. 1978). Purchases of narcotics from petitioner's brother would never reveal petitioner's sources for those narcotics, and physical surveillance was of diminishing success because the suspects spotted their followers and took pains to avoid them (Pet. App. 55-57, 74-75). Surveillance, furthermore, could not uncover the details of relationships or conversations (Pet. App. 34-35).

8/ Petitioner argues that other techniques, which were not tried because of their minimal potential for success, should have been utilized, but "the purpose of the requirement in section 2518(1)(c) is not to foreclose electronic surveillance until every other imaginable method of investigation has been unsuccessfully attempted." United States v. Pacheco, 489 F.2d 554, 565 (5th Cir. 1974), cert. denied, 421 U.S. 929 (1975). See also United States v. Baker, 589 F.2d 1008, 1013 (9th Cir. 1979); United States v. Vento, 533 F.2d 838, 849-850 (3d Cir. 1976).

3. Petitioner further alleges (Pet. 37-38) that the court erred in denying him a hearing to challenge the truthfulness of certain statements within the affidavits. Petitioner challenged the affidavits prior to trial, claiming they contained reckless misstatements and deliberate falsities. He also filed a three-page affidavit in effect denying certain of the statements (Pet. App. 81-83). The district court found that petitioner's personal denials presented an insufficient basis for a hearing, but gave petitioner an opportunity to offer further proof sufficient to overcome the presumed validity of the affidavits. After petitioner failed to present further evidence beyond DEA reports that were already part of the record, the court found that the affidavits, DEA reports, and offers of proof were insufficient to require a hearing (Feb. 15, 1979 Order 7-13). The court of appeals also rejected petitioner's claim that a hearing was required (Pet. App. 2-3).

The district court's denial of a hearing on the affidavits, and the court of appeals' affirmance of the lower court's ruling, fully satisfy the standards set forth in Franks v. Delaware, 438 U.S. 154 (1978). Petitioner challenged the accuracy of only a few representations in the three affidavits. He failed to demonstrate, however, that the allegedly inaccurate information was not "believed or appropriately accepted by the affiant as true" (id. at 165), the standard for determining recklessness or deliberate

falsification. 9/ And, even assuming that petitioner's contrary allegations demonstrated the falsity of the challenged statements, the remaining portions of the affidavits supported a finding that normal investigative techniques would be unsuccessful; thus, no hearing would have been necessary in any event (id. at 172).

4. Petitioner additionally claims (Pet. 38-40) that the administrative subpoena of certain telephone records prior to obtaining warrants for wire interception tainted the subsequent warrants. After a lengthy hearing the district court correctly rejected this contention, in a well-reasoned opinion. (June 20, 1979 Order. A copy of this order has been lodged with the Clerk of this Court.) In particular, the district court rejected the argument that an administrative subpoena for "cable and pair" information, which relates to the wires serving a particular telephone number, is insufficient under the federal electronic surveillance statute, 18 U.S.C. 2510 et seq. The court further found that petitioner had no privacy right in the telephone company's business records, and concluded that obtaining "cable and pair" information prior to obtaining a court order does not violate 18 U.S.C. 2510 et seq.

9/ As the Ninth Circuit has recognized, efforts to synthesize or summarize a substantial amount of information necessarily involve "omission and an element of distortion, but that fact alone does not establish either deliberate falsehood or reckless disregard for the truth." United States v. Young Buffalo, 591 F.2d 506, 510-511 (9th Cir.), cert. denied, 441 U.S. 950 (1979).

inasmuch as the information is not an intercepted 10/ wire or oral communication (June 20, 1979 Order 4-6.). 11/

5. Petitioner finally alleges (Pet. 38-42) that the composite tapes were inaccurate and not properly sealed. This claim lacks merit.

The tapes at issue here consist of "original" recordings and contemporaneously made "duplicate-original" recordings. The originals were immediately placed in heat-sealed envelopes and were available to the defense for comparison. 12/ The duplicate originals were used to prepare composite tapes that were played to the jury. No evidence was presented to substantiate petitioner's claim that the composite tapes were altered, and petitioner apparently declined to request comparisons with the heat-

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10/ The court noted that "cable and pair" information is not acquired "aurally", so it is not within the statutory definition of "intercept," 18 U.S.C. 2510(4), nor is it acquired by the use of any electronic, mechanical, or other device within the meaning of the statute (June 20, 1979 Order 5).

11/ Indeed, petitioner implicitly concedes this very point when he argues that the obtaining of telephone records and pen register information before the interception was a legitimate investigative effort making resort to electronic surveillance unnecessary (see Pet. 29).

12/ Petitioner claims that the original tapes were not sealed "under the direction of the judge" (Pet. 41) (emphasis in original). The district court, however, specifically found that the "DEA agents participating in this case at all times maintained proper custody and control of the original tape recordings in accordance with the orders of the Honorable Wm. P. Copple, U.S. District Judge, District of Arizona, and of the duplicate original tape recordings from which the composite tape * * * was made" (June 20, 1979 Order 3)(emphasis added). The court further found that, as of June 20, 1979, the original tapes were "still under court seal" (id. at 7)(emphasis added).

sealed originals that would substantiate his claim. Thus, both courts below were correct in approving these procedures (Pet. App. 3; June 20, 1979 Order 7).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

LAWRENCE G. WALLACE
Acting Solicitor General

D. LOWELL JENSEN
Assistant Attorney General

SARA CRISCITELLI
Attorney

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